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No. 571

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

HOWARD L. NOSTRAND and MAX SAVELLE, *Appellants*,

vs.

HERBERT S. LITTLE, HAROLD S. SHEFELMAN, MRS. J. HERBERT GARDNER, CHARLES M. HARRIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington, CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

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SUBJECT INDEX

Page

Jurisdictional Statement 1

Opinions Below 2

Jurisdiction 2

Questions Presented 5

Statement of the Case 6

The Questions Are Substantial 9

A. The First, Second and Third Questions Presented Are Substantial 9

B. The Fourth Question Is Substantial 12

C. The Sixth and Seventh Questions Present Substantial Problems 15

D. The Eighth Question Presents a Substantial Problem 17

Conclusion 20

Appendices:

Appendix A. Decision of the Washington State Supreme Court, 53 Wn.(2d) 460, 335 P.(2d) 10 ..... App. p. 1

Appendix B. Decision of the Washington State Supreme Court, 158 Wash. Dec. 101 ..... App. p. 47

Appendix C. Journal and Judgment in the Supreme Court of the State of Washington ..... App. p. 86

Page

Appendix D. Journal and Judgment in the Supreme Court of the State of Washington ..... App. p. 88

Appendix E. Statutes Involved ..... App. p. 90

Appendix F. The Oath ..... App. p. 96

TABLE OF CASES

Adler v. Board of Education, 342 U. S. 485, 72 S. Ct. 380, 96 L. ed. 517 (1952) 11, 18

American Civil Liberties Union of Southern California v. the Board of Education of Los Angeles, 10 Cal. Rptr. 647, 359 P.(2d) 45 (1961) pet. for cert. granted, U. S. Supreme Court Docket No. 108 (1961) 19

Barenblatt v. U. S., 360 U. S. 109, 79 S. Ct. 1081, 3 L. ed.(2d) 1115 (1959) 12

Beilan v. Board of Education, 357 U. S. 399, 78 S. Ct. 1317, 2 L. ed.(2d) 1414 (1958) 11

Braden v. U. S., 365 U. S. 43, 81 S. Ct. 584, 5 L. ed.(2d) 653 (1960) 12

Bridges v. Wixon, 326 U. S. 135, 65 S. Ct. 1443, 89 L. ed. 2103 (1943) 11

Danskin v. San Diego Unified School District, 28 Cal.(2d) 536, 171 P.(2d) 885 (1946) 18, 19

Elston v. McGlauflin, 79 Wash. 355, 140 Pac. 396 (1914) 13

Page

First Unitarian Church of Los Angeles v. County of Los Angeles, 357 U. S. 545, 78 S. Ct. 1350, 2 L. ed.(2d) 1484 (1958) 19

Garner v. Board of Public Works, 341 U. S. 716, 71 S. Ct. 909, 95 L. ed. 1317 (1951) 11

Gnecchi v. State of Washington, 158 Wash. Dec. 475 (1961) 13

In re Young's Estate, 40 Wn.(2d) 582, 244 P.(2d) 1165 (1952) 14

Konigsberg v. State Bar of California, 353 U. S. 252, 77 S. Ct. 722, 1 L. ed.(2d) 810 (1957), 366 U. S. 36, 81 S. Ct. 997, 1 L. ed.(2d) 105 (1961).... 12, 16

Larson v. Department of Labor and Industries, 174 Wash. 618, 25 P.(2d) 1040 (1933) 13

Lawson v. Housing Authority of the City of Milwaukee, 270 Wisc. 269, 70 N.W.(2d) 605 (1955) 18

Lerner v. Casey, 357 U. S. 468, 78 S. Ct. 1311, 2 L. ed.(2d) 1423 (1958) 11

Nelson v. County of Los Angeles, 362 U. S. 1, 80 S. Ct. 527, 4 L. ed.(2d) 494 (1960)..... 11-12, 15

Schware v. Board of Examiners, 353 U. S. 232, 77 S. Ct. 752, 1 L. ed.(2d) 796 (1957) 12

Shelton v. Tucker, 364 U. S. 479, 81 S. Ct. 287, 5 L. ed.(2d) 231 (1960) 10, 16

Slochower v. Board of Education, 350 U. S. 551, 76 S. Ct. 637, 100 L. ed. 692 (1955)..... 5, 10, 11, 12

Speiser v. Randall, 357 U. S. 513, 78 S. Ct. 637, 2 L. ed.(2d) 1460 (1958) 5, 10, 18

Swak v. Department of Labor and Industries, 41 Wn.(2d) 51, 240 P.(2d) 560 (1952) 13-14

Page

Sweezy v. New Hampshire, 354 U. S. 234, 77 S. Ct. 1203, 1 L. ed.(2d) 1311 (1957)..10, 12, 16, 19

Uphaus v. Wyman, 360 U. S. 72, 79 S. Ct. 1040, 3 L. ed.(2d) 1090 (1959) 12

Uphaus v. Wyman, 364 U. S. 388, 81 S. Ct. 153, 5 L. ed.(2d) 148 (1960) 12

West v. Keith, 154 Wash. 682, 283 Pac. 198 (1929)..... 13

West Virginia State Board of Education v. Barnette, 319 U. S. 624, 63 S. Ct. 1178, 87 L. ed. 1628 (1943) 17-18

Wieman v. Updegraff, 344 U. S. 183, 73 S. Ct. 215, 97 L. ed. 216 (1952) 4-5, 16, 18

Wilkinson v. U. S., 365 U. S. 399, 81 S. Ct. 567, 5 L. ed.(2d) 633 (1960) 12

STATUTES

Laws of 1955, Chap. 377, §§ 1, 2, 3, 4 ..... 7, 8, 10

Laws of Washington of 1955, Chap. 377, § 1..... 2, 4, 5, 10

R.C.W. 2.04.220 (1951 3

R.C.W. 7.24.010 et seq. 2

R.C.W. 9.81 4

R.C.W. 9.81.010 (5) 17

R.C.W. 9.81.060 10

R.C.W. 9.81.070 through 9.81.083 4

28 USC § 1257 (2) 4

No.....

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vs.

HERBERT S. LITTLE, HAROLD S. SHEFELMAN, MRS. J. HERBERT GARDNER, CHARLES M. HARRIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington, CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Respondents*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

STATEMENT AS TO JURISDICTION

JURISDICTIONAL STATEMENT

Appellants' appeal from the Order of the Supreme Court of the State of Washington entered in this action on June 28, 1961, whereby it was ordered that the Judgment entered by said Court on March 20, 1959, and vacated by this Court on June 17, 1960, be reinstated and from the Judgment entered June 29, 1961, which reversed in part the Judgment of the Superior Court of the State of Washington for Thurston County. Appellants submit this statement in support of their contention that the

Supreme Court of the United States has jurisdiction of this appeal and that substantial questions are presented.

OPINIONS BELOW

The Superior Court of the State of Washington for Thurston County did not render an official or unofficial opinion. The first opinion of the Supreme Court of the State of Washington (January 29, 1959) is reported in 53 Wn.(2d) 460, 335 P.(2d) 10 (1959), and is annexed hereto as Appendix A. The second opinion of the Court below (April 20, 1961), rendered subsequent to remand by this Court has not yet been officially reported; it appears unofficially at 158 Wash. Dec. 101, 361 P.(2d) 551 (1961), and is annexed hereto as Appendix B.

JURISDICTION

Appellants Howard L. Nostrand and Max Savelle, two professors employed by the State of Washington under yearly contract to teach at the University of Washington, commenced this action pursuant to Section 7.24.010 et seq., Revised Code of Washington, for the purpose of obtaining a declaratory judgment adjudicating Chapter 377, Laws of Washington of 1955, which required execution of a non-subversive oath of all state employees on penalty of dismissal, to be violative of several provisions of the Constitution of the United States and of the State of Washington, and seeking a permanent injunction enjoining the enforcement thereof (Tr. 1-6). The Superior Court found that Chapter 377 violated the Constitution of the State of Washington and issued an injunction permanently restraining the enforcement or administration

of its provisions (Tr. 29). The Supreme Court of the State reversed in part, upholding the validity of all of Chapter 377 under both the United States and Washington Constitutions with the exception of Section 3 of said Chapter, and remanded the case to the Superior Court with directions to dissolve the permanent injunction except as to Section 3 and to dismiss the action (Tr. 39). A copy of the Judgment of the Supreme Court of Washington is annexed as Appendix C. Judgments of the Supreme Court of Washington are final as to all parties. RCW 2.04.220 (1951). On February 26, 1959, a petition for rehearing (Tr. 33-37) was filed with the Supreme Court of Washington, which was denied on March 20, 1959 (Tr. 38). Notice of Appeal to this Court was filed in the Supreme Court of Washington on May 28, 1959 (Tr. 84-87). This Court by order dated June 13, 1960 vacated the Judgment of the Supreme Court of Washington and remanded the case to it to determine whether Chapter 377 afforded appellants a hearing, and to redetermine the constitutionality of said Chapter (Tr. 78-79). The Supreme Court of Washington ordered that the Judgment entered by said Court on March 20, 1959 be reinstated and directed the Superior Court to dissolve the permanent injunction and to dismiss the action. A copy of the Judgment of the Supreme Court of Washington is annexed as Appendix D. On May 19, 1961, a petition for rehearing (Tr. 123-132) was filed with the Supreme Court of Washington, which was denied on June 9, 1961 (Tr. 133). Notice of appeal to this Court was filed in the Supreme

Court of Washington on September 25, 1961 (Tr. 140-143).

The statute drawn into question on the ground that it is repugnant to the United States Constitution is Chapter 377, Laws of Washington, 1955, Revised Code of Washington, Sections 9.81.070 through 9.81.083. The most pertinent parts of this Chapter are as follows:

> "Sec. 1. Every person and every board, commission council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees . . . shall require every employee . . . to state under oath whether or not he or she is a member of the Communist Party or other subversive organization, and refusal to answer *on any grounds* shall be cause for immediate termination of such employee's employment. . . ." (Emphasis supplied.)
>
> "Sec. 4. The Communist Party is a subversive organization within the purview of RCW 9.81 and membership in the Communist Party is a subversive activity thereunder."

This Act has reference to and is defined by other sections of RCW 9.81. These statutory provisions are lengthy and therefore are set forth in Appendix E. The oath demanded of appellants is set forth in Appendix F.

The decision of the highest court of the State of Washington sustained the validity of Chapter 377 under the United States and Washington Constitutions (with the exception of Section 3). For this reason, this Court has jurisdiction on appeal. 28 USC Sec. 1257 (2); *Wieman v.*

Updegraff, 344 U.S. 183, 73 S. Ct. 215, 97 L. ed. 216 (1952); *Slochower v. Board of Education*, 350 U.S. 551, 76 S. Ct. 637, 100 L. ed. 692 (1955); *Speiser v. Randall*, 357 U. S. 513, 78 S. Ct. 637, 2 L. ed.(2d) 1460 (1958).

QUESTIONS PRESENTED

The following questions are presented by this appeal:

1. Does the State's requirement of an oath pursuant to Chapter 377, Laws of Washington, 1955, of non-membership in the Communist Party or other subversive organization as a condition for any employment by the state, violate the due process guarantee of the Fourteenth Amendment to the United States Constitution, because no hearing is afforded the employee wherein an inquiry may be made as to the character of the subversive organization or the character of his membership therein, and where the employee can explain or defend his refusal to take the oath?

2. Does such oath requirement violate the Fourteenth Amendment of the Constitution of the United States in that it requires immediate discharge of a state employee solely upon refusal to subscribe the oath and without notice, charges and hearing?

3. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it deprives respondent of property without due process of law?

4. Does the consideration by the Supreme Court of Washington of the 1956 Faculty Handbook as a basis for the Order and Judgment appealed from, secured

sua sponte by that Court after the filing of all briefs and presentation of oral arguments following the remand of the case from the United States Supreme Court, violate the due process guarantee of the Fourteenth Amendment to the United States Constitution, because of the denial to the parties of a hearing or opportunity to present evidence concerning the said Handbook?

5. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it penalizes a state employee for membership in a subversive organization rather than for acts constituting a substantive evil, even in the absence of his knowledge that the subversive organization has for its purpose the forceful overthrow of the government?

6. Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it conclusively presumes that membership in a subversive organization is grounds for dismissal of a state employee?

7. Does such oath requirement violate the First and Fourteenth Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?

STATEMENT OF THE CASE

The appellants are two professors, employed under contract by the State of Washington to teach at the University of Washington (Tr. 26). The respondents, the University Board of Regents, president of the Uni-

versity, and the State Attorney General are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955 (Tr. 26-27)*. The respondents have demanded that appellants sign and swear to an oath, a copy of which appears at Appendix F hereto (Tr. 27). The appellants in their petition allege that unless they comply with such demands, their employment contracts with the University will be terminated as required by Chapter 377 (Tr. 3). The statute provides no opportunity for explanation or hearing.

Chapter 377, Laws of 1955 is comprised of four sections which amended the Subversive Activities Act of 1951. The first section requires every appointing or employing official of the State or political subdivision thereof to "require every employee . . . to state under oath whether he or she is a member of the Communist Party or other subversive organization and refusal to answer *on any grounds* shall be cause for immediate termination of such employee's employment." The fourth section provides as follows:

> "The communist party is a subversive organization within the purview of R.C.W. 9.81 [The Subversive Activities Control Act of 1951] and membership in the Communist Party is a subversive activity thereunder."

The federal questions sought to be reviewed here were

*Because the incumbents in their various offices have changed from time to time during the course of this litigation, the names of the respondents have been changed by stipulation and order to accord with the facts.

first raised in the Complaint (Tr. 3) and the federal and state constitutional issues were the only matters in controversy at all stages of the proceeding in the trial court and the State Supreme Court. There were no factual controversies in this action. The trial court found that Section 4 of Chapter 377 violated the State Constitution in that it embraced a subject not set forth in the title to Chapter 377, that Section 3 of the Chapter, which declared "subversive" all organizations on the U. S. Attorney General's list of subversive organizations, was an unconstitutional delegation of legislative authority. That court held that Sections 1 and 2 were inseparable from Sections 3 and 4 and that therefore all of Chapter 377 was unconstitutional and void (Tr. 28). An injunction was issued restraining the enforcement of the provisions of this chapter (Tr. 29). From this injunction the respondents appealed to the State Supreme Court (Tr. 30). That court after briefs and argument, held that Section 3 was unconstitutional but upheld the constitutionality and separability of Sections 1, 2 and 4 (Tr. 39). The decision of the State Supreme Court was appealed to this Court (Tr. 75-77). This Court vacated the judgment of the State Supreme Court and remanded the case to it to determine whether Chapter 377 afforded appellants a hearing and to see what effect this determination had upon their initial decision (Tr. 78-79). The Supreme Court of Washington after briefs and argument, held that Chapter 377 did not afford appellants a hearing, but decided that they were not denied due process of law under the United

States Constitution or the Constitution of the State of Washington, because the presently existing rules of the University of Washington, acquired *sua sponte* by the Court after argument by counsel, provided that professors having employment tenure must be given a hearing before dismissal. That opinion is annexed hereto as Appendix B. That Court thereafter ordered that the judgment entered by it on March 20, 1959 be reinstated (Tr. 134). Due to a temporary and later a permanent injunction, issued by the trial court, respondents have made no efforts to enforce the provisions of this chapter with reference to appellants. This final injunction is still in force pending this appeal (Tr. 73-74, 136-137).

THE QUESTIONS ARE SUBSTANTIAL

A. The First, Second and Third Questions Presented Are Substantial.

1. *Does the State's requirement of an oath pursuant to Chapter 377, Laws of Washington of 1955, of non-membership in the Communist Party or other subversive organization as a condition for any employment by the state, violate the due process guarantee of the Fourteenth Amendment to the United States Constitution, because no hearing is afforded the employee wherein an inquiry may be made as to the character of the subversive organization or the character of his membership therein, and where the employee can explain or defend his refusal to take the oath?*

2. *Does such oath requirement violate the Fourteenth Amendment of the Constitution of the United States*

in that it requires discharge of a state employee solely upon refusal to subscribe the oath and without notice, charges and hearing?

3. *Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it deprives respondent of property without due process of law?*

Section 1, Chapter 377, Laws of Washington, 1955 provides that refusal "on any grounds" to sign the oath shall be cause for "immediate termination of employment." RCW 9.81.060 provides that no subversive person as defined in the Act, shall be eligible for employment by the state or political subdivision. This, in connection with Section 4 of Chapter 377, means that appellants are subject to immediate discharge without an opportunity to be heard or explain regardless of why they are unwilling or unable to execute the oath, nor what reason they have for belonging to the Communist Party or other subversive organization.

Such preemptory dismissal constitutes arbitrary action punitive in nature and as such, constitutes a denial of due process within the meaning of the Fourteenth Amendment. *Slochower v. Board of Education of New York*, 350 U. S. 551, 76 S. Ct. 637, 100 L. Ed. 692 (1955); *Sweezy v. New Hampshire*, 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed.(2d) 1311 (1957); *Speiser v. Randall*, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed.(2d) 1460 (1958); and *Shelton v. Tucker*, 364 U. S. 479, 81 S. Ct. 287, 5 L. Ed.(2d) 231 (1960). For it should not be presumed that every knowing membership

in a subversive organization is necessarily a hostile or unlawful act rendering a member unfit for state employment, and subject to punitive action. It should be noted that the oath requirement is not directed at subversive activities, but a mere membership in a subversive organization. *Cf. Bridges v. Wixon*, 326 U. S. 135, 65 S. Ct. 1443, 89 L. Ed. 2103 (1943).

This statute requires that appellants, as a condition of continued university employment, comply with terms which are unreasonable, unlawful and discriminatory, and its validity cannot be sustained by *Garner v. Board of Public Works*, 341 U. S. 716, 71 S. Ct. 909, 95 L. Ed. 1317 (1951); *Adler v. Board of Education*, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952); *Lerner v. Casey*, 357 U. S. 468, 78 S. Ct. 1311, 2 L. Ed.(2d) 1423 (1958) and *Beilan v. Board of Education*, 357 U. S. 399, 78 S. Ct. 1317, 2 L. Ed.(2d) 1414 (1958), which were relied upon by the State Supreme Court in its first opinion. Each of these cases involved hearings at which the employee could appear and argue his case. This factor was considered as distinquishing, by this court in the *Slochower* case, *supra*, in which it was held that the automatic and summary dismissal of the appellant without an opportunity for explanation constitutes a denial of due process of law.

The State Supreme Court held that immediate dismissal of an employee who declines to sign the oath is not a violation of due process on the basis of *Nelson v. County of Los Angeles*, 362 U. S. 1, 80 S. Ct. 527, 4 L. Ed.(2d)

494 (1960). That court misinterpreted the *Nelson* case, *supra*, and improperly based its decision in the *instant* case upon it. That court also cited *Barenblatt v. U. S.*, 360 U. S. 109, 79 S. Ct. 1081, 3 L. Ed.(2d) 1115 (1959); *Uphaus v. Wyman*, 360 U. S. 72, 79 S. Ct. 1040, 3 L. Ed. (2d) 1090 (1959); *Uphaus v. Wyman*, 364 U. S. 388, 81 S. Ct. 153, 5 L. Ed.(2d) 148 (1960); *Wilkinson v. U. S.*, 365 U. S. 399, 81 S. Ct. 567, 5 L. Ed.(2d) 633 (1960), and *Braden v. U. S.*, 365 U. S. 43, 81 S. Ct. 584, 5 L. Ed.(2d) 653 (1960) as additional authority for their original decision herein. These decisions concern the investigative authority of congressional committees and the requisite concreteness of enabling rules and resolutions, and do not support the state court's holding.

It is significant that both opinions of the Washington Supreme Court in the case at bar, failed to discuss, distinguish, or even to refer to holdings of the United States Supreme Court in the following cases, although these cases were cited to the court and discussed extensively by the appellants in their briefs: *Slochower v. Board of Education*, *supra*; *Konigsberg v. State Bar of California*, 353 U. S. 252, 77 S. Ct. 722, 1 L. Ed.(2d) 810 (1957); *Schware v. Board of Bar Examiners*, 353 U. S. 232, 77 S. Ct. 752, 1 L. Ed.(2d) 796 (1957); and *Sweezy v. New Hampshire*, 354, U. S. 234, 77 S. Ct. 1203, 1 L. Ed.(2d) 1311 (1957).

In the case at bar, as in *Slochower*, dismissal is automatic and immediate; due process is consequently denied.

B. The Fourth Question Is Substantial.

4. *Does the consideration by the Supreme Court of*

Washington of the 1956 Faculty Handbook as a basis for the Order of Judgment appealed from, secured sua sponte *by that Court after the filing of all briefs and presentation of oral arguments following the remand of the case from the United States Supreme Court, violate the due process guarantee of the Fourteenth Amendment to the United States Constitution, because of the denial to the parties of a hearing or opportunity to present evidence concerning the said Handbook?*

The contents of the 1956 Faculty Handbook of the University of Washington is not a matter of common and general knowledge; neither is it an indisputable fact so that the Supreme Court of Washington is justified in taking judicial notice of it *sua sponte*.

The Supreme Court of Washington must look only to the record to obtain factual material upon which to base its decision. *Gnecchi v. State of Washington*, 158 Wash. Dec. 475 (1961), and *West v. Keith*, 154 Wash. 682, 283 Pac. 198 (1929). Similarly the decision of a trial judge will be rejected on appeal if it is based upon his own investigation of the facts. *Elston v. McGlauflin*, 79 Wash. 355, 140 Pac. 396 (1914). The appellate court will not take judicial notice of the rules of the superior court, *Larson v. Department of Labor and Industries*, 174 Wash. 618, 25 P.(2d) 1040 (1933), or of the proceedings of the county commissioners even though recorded in the County Auditor's Office, *West v. Keith*, 154 Wash. 682, 283 Pac. 198 (1929), or of records and decisions in other actions between the same parties. *Swak v. Department of Labor and Industries*, 41 Wn.(2d) 51, 240 P.(2d)

560 (1952); *In re Young's Estate*, 40 Wn.(2d) 582, 244 P.(2d) 1165 (1952).

Respondents, in answer to appellants' request for admissions of fact, which referred to the 1948 and 1952 Faculty Handbooks, denied that the handbooks were approved by the Board of Regents or that they governed the relationship between the faculty and the administration of the University. Since that was denied, the cause was thereafter tried without reference to such faculty handbooks. The court below gave greater authority to the handbooks than does the University.

The handbook provides that a professor may be removed only "for cause," which is defined as one or more of the following:

(1) incompetency, (2) neglect of duty, (3) physical or mental incapacity, (4) dishonesty or immorality, (5) conviction of a felony. The refusal to sign the oath does not appear to be within the ambit of any of these specifically enumerated causes. Accordingly, it is submitted that the handbook causes do not contemplate the situation of a professor who has refused to sign the necessary oath.

The Supreme Court of Washington, having averted to the faculty handbook when it was not in the record or argued by the parties, has caused endless confusion and raised numerous unanswered questions such as: (a) Are the tenure rights, once retained by the professors, enduring? (b) May they be reviewed, modified, or eliminated? (c) Is it important that the 1956 Faculty Hand-

book relied upon by the court below was promulgated after the effective date of the 1955 Act? (d) Can the regents, by the tenure code, modify the mandate of the statute so that any person who refuses to sign the oath "on any grounds" is not immediately discharged? (e) Does the handbook prevent the discharge of a professor for any reason other than the five stated grounds?

It is to be noted that neither the statute nor the handbook include a provision that a state employee refusing to comply with the requirements of the Subversive Activities Act is guilty of insubordination or any other violation of his employment contract, as was the case in *Nelson v. County of Los Angeles, supra.* It is apparent that the action by the court below securing the 1956 Faculty Handbook *sua sponte* denied appellants due process of law by violating most basic and sacred rules of evidence and procedure.

C. The Fifth and Sixth Questions Present Substantial Problems.

5. *Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States in that it penalizes a state employee for membership in a subversive organization rather than for acts constituting a substantive evil, even in the absence of his knowledge that the subversive organization has for its purpose the forceful overthrow of the government?*

6. *Does such oath requirement violate the Fourteenth Amendment to the Constitution of the United States*

in that it conclusively presumes that membership in a subversive organization is grounds for dismissal of a state employee?

In *Konigsberg v. State Bar of California*, 353 U. S. 252, 77 S. Ct. 722, 1 L. Ed.(2d) 810 (1957), this court held that an appellant's refusal to answer questions concerning affiliation with the Communist Party without anything more is not a ground for denying him admission to the Bar. The court stated that such membership alone is not an adequate basis for concluding that the member is disloyal or a person of bad character. This holding was not reversed or qualified by this court's second opinion in that case. 366 U. S. 36, 81 S. Ct. 997, 1 L. Ed.(2d) 105 (1961).

The statute provides that a member of the Communist Party or other subversive organization is conclusively unfit and ineligible to hold public employment. It goes far beyond what is necessary to accomplish any legitimate governmental purpose. *Sweezy v. New Hampshire*, 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed.(2d) 1311 (1957) [concurring opinion by Justice Frankfurter], *Shelton v. Tucker*, 364 U. S. 479, 81 S. Ct. 287, 5 L. Ed.(2d) 231 (1960).

This law presumes that any member no matter what the qualifications or extenuating circumstances is disloyal and unfit for government employment and that he must be summarily discharged. The Act is directed at the clothing of the traitor rather than his traitorous activity. It is thus an indiscriminate and unreasonable classification upon

which to deny public employment. *Wieman v. Updegraff, supra.* It must fall as an assertion of arbitrary power offending due process.

Prior to 1955, the Subversive Activities Act specifically required knowledge of the voluntary purposes of the organization before one could be found to be a subversive person through membership. RCW 9.81.010 (5). Section 4 of the 1955 Act specifically eliminated scienter (i.e., knowledge of the revolutionary nature of the organization as distinguished from knowledge of his membership in the organization) from the definition of a subversive person. Even though the Supreme Court of Washington states that it finds that the element of scienter "is implied in every clause (of the oath) and of the pertinent statutory provisions," that court appears to hold that since it is "common knowledge" that the Communist Party is a subversive organization (Tr. 59), specific knowledge of the Communist Party's purposes or activities is universal and therefore to be presumed conclusively. It is submitted that this holding is contrary to the specific holding of this Court in *Wieman v. Updegraff, supra.*

D. The Seventh Question Presents a Substantial Problem.

7. *Does such oath requirement violate the First and Fourteenth Amendments to the Constitution of the United States in that it abridges freedom of speech, freedom of association and assembly?*

Mr. Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 63 S. Ct. 1178, 87

L. Ed. 1628 (1943), which sustained the religious convictions of school children against saluting the flag, stated:

> "If there is any fixed star in our constitutional constellation it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us." 319 U. S. 642

The freedoms protected by the First Amendment to the Constitution can be limited or abridged only to correct substantial evils with which the legislature has power to deal. *Adler v. Board of Education*, 342 U. S. 485, 72 S. Ct. 380, 96 L. Ed. 517 (1952); *Lawson v. Housing Authority of the City of Milwaukee*, 270 Wisc. 269, 70 N. W. (2d) 605 (1955) *Danskin v. San Diego Unified School District*, 28 Cal.(2d) 536, 171 P.(2d) 885 (1946).

As applied to educators, as in the case at bar, the need for freedom of expression and association is a fundamental requisite. Freedom of inquiry, advocacy and association is probably more essential to the growth and spread of academic knowledge than to any other area of human activity. See concurring opinion of Mr. Justice Frankfurter in *Wieman v. Updegraff, supra; Sweezy v. New Hampshire*, 354 U. S. 234, 77 S. Ct. 1203, 1 L. Ed. (2d) 1311 (1957); *Speizer v. Randall*, 357 U. S. 513, 78 S. Ct. 1332, 2 L. Ed.(2d) 1460 (1958).

The need for protecting college students from subversive propaganda must be viewed in relation to legislative

steps taken to afford such protection. Here no effort is made to inquire into the professor's loyalty, merely his associations. While his associations may have bearing on his loyalty, standing alone without more they are not decisive. *First Unitarian Church of Los Angeles v. County of Los Angeles*, 357 U. S. 545, 78 S. Ct. 1350, 2 L. Ed. (2d) 1484 (1958) and *American Civil Liberties Union of Southern California v. The Board of Education of Los Angeles*, 10 Cal. Rptr. 647, 359 P.(2d) 45 (1961) petition for certiorari granted, U. S. Supreme Court Docket No. 108 (1961).

The legislature attempts to deny employment to everyone refusing to sign this oath not because it believes that their employment would create a clear and present danger to the community, but because it believes the privilege of public employment should be denied to those whose convictions and affiliations it does not choose to accept or tolerate. "What it does not tolerate it seeks to censor." *Danskin v. San Diego Unified School District*, 28 Cal.(2d) 536, 171 P.(2d) 885 (1946), at page 891. It is submitted that this is an unwarranted abridgement of freedom of association and assembly.

CONCLUSION

Appellants submit that the disregard of Federal constitutional rights by the Legislature of the State of Washington and by the Supreme Court of Washington is clear and that this appeal presents substantial questions requiring consideration by this Court.

Respectfully submitted,

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APPENDIX

APPENDIX A

DECISION OF THE WASHINGTON STATE SUPREME COURT

[53 Wn.(2d) 460, 335 P.(2d) 10]

[No. 34451. *En Banc*. January 29, 1959.]

HOWARD L. NOSTRAND *et al.*, *Respondents*, v. THOMAS BALMER *et al.*, *Appellants*.

Appeal from a judgment of the superior court for Thurston county, No. 28814, Wright, J., entered April 29, 1957, upon findings in favor of the plaintiffs, in an action for a declaratory judgment and for injunctive relief. Reversed.

The Attorney General and Michael R. Alfieri, Assistant, for appellants.

Solie M. Ringold and *Francis Hoague*, for respondents.

DONWORTH, J.—This action was commenced by two professors (respondents), employed by the state of Washington to teach at the University of Washington for the purpose of obtaining a declaratory judgment[2] adjudicating Laws of 1955, chapter 377, p. 1545,[3] to be violative of several provisions of the constitutions of the United States and of this state, and seeking a permanent injunction enjoining the enforcement thereof.

[2]Pursuant to the provisions of RCW 7.24.010, *et seq.*

[3]This act consists of four sections, the first two of which are amendatory of provisions initially enacted in the subversive activities act, Laws of 1951, chapter 254, p. 793, and the last two of which are entirely new legislation.

In their complaint, respondents alleged their employment under contract as professors of the University of Washington; that appellants (the university board of regents, president, and vice-president, and the state attorney general) are charged with "the duty of establishing, enforcing, carrying out and administering the provisions of . . . the Act"; that appellants have demanded that respondents sign and swear to an oath; that, unless respondents comply with such demands, their employment contracts with the university will be terminated by appellants; that, unless appellants be restrained from enforcing the act and insisting upon the execution of the oath, respondents will suffer irreparable injury not compensable in monetary damages; and that respondents have no adequate remedy at law.

In so far as is presently material, the affidavit which appellants demanded that respondents subscribe, upon oath, recites above the jurat and place provided for signature:

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955,

with full knowledge that the same is subject to the penalties of perjury."

Prior to trial, respondents requested, in writing, and obtained certain admissions of fact. Other facts which respondents requested appellants to admit were denied. The record before us does not reveal what disposition, if any, the trial judge made of these disputed factual matters.

Trial to the court resulted in the entry of findings of fact (substantially in accord with the averments contained in the complaint), conclusions of law, and a final decree holding the entire act of 1955 to be violative of the constitution of this state, and permanently restraining appellants from administering and enforcing any of the provisions therein contained.[4] This appeal followed.

Before considering the respective contentions advanced by the parties, and because chapter 377, Laws of 1955, is amendatory legislation, it is necessary, in order to place it in its proper perspective, to analyze the act amended thereby, *i.e.*, the subversive activities act of 1951,[5] and to consider its background and legislative history.

The 1951 act was a comprehensive statute enacted by the legislature pursuant to executive request and as a

[4]The material portions of the final decree read as follows:

"It Is Hereby Ordered, Adjudged and Decreed that Chapter 377, Laws of 1955 violates the Constitution of the State of Washington, and is therefore void and of no effect; and

"It Is Further Ordered, Adjudged and Decreed that the above-named defendants [appellants] be and they are hereby permanently restrained from establishing, enforcing, carrying out, and administering the provisions of Chapter 377, Laws of 1955 and from requiring the plaintiffs [respondents] to execute any oath pursuant to said Chapter."

[5]Chapter 254, Laws of 1951, p. 793.

result of the report of the joint fact-finding committee on un-American activities in the state of Washington (otherwise referred to as the Canwell committee). This committee was created by house concurrent resolution No. 10,[6] adopted by the legislature at its 1947 session, and was directed to investigate subversive activities in the State of Washington and to file a report wth the thirty-first (1949) legislature.

Acting pursuant to authority vested in it by this resolution, the committee conducted its investigation and held extensive public hearings in 1948.[7] As directed, the committee reported its findings, conclusions, and recommendations to the legislature at its 1949 session.[8]

[6]Laws of 1947, p. 1378. Pertinent provisions of this resolution are quoted at length in appendix A. The complete text of house concurrent resolution No. 10 may also be found in *State ex rel. Robinson v. Fluent*, 30 Wn.(2d) 194, 191 P.(2d) 241 (1948) (cert. den., 355 U. S. 844, 93 L. Ed. 394, 69 S. Ct. 66), wherein we upheld the validity of this resolution.

[7]Other litigation resulted from these hearings, notably *State v. James*, 36 Wn.(2d) 882, 221 P.(2d) 482; 341 U. S. 911, 95 L. Ed. 1348, 71 S. Ct. 615 (cert. den.); 341 U. S. 937, 95 L. Ed. 1365, 71 S. Ct. 851 (rehearing den.). The defendant therein was charged, tried and convicted for willfully refusing to answer a proper and material question put to him by the committee after being duly summoned to give testimony. In rejecting appellant's attack upon the constitutionality of house concurrent resolution No. 10, we adhered to our prior decision in *State ex rel. Robinson v. Fluent, supra*. Other cases involving witnesses before the committee who were similarly charged, tried, and convicted, were consolidated on appeal to this court: *State v. Gundlach, State v. Forschmiedt, State v. Ottenheimer, State v. James*, 36 Wn.(2d) 918, 221 P.(2d) 502; cert. den. in *Forschmiedt* and *James* cases; 341 U. S. 910, 95 L. Ed. 1347, 71 S. Ct. 615, rehearing den. 341 U. S. 937, 95 L. Ed. 1365, 71 S. Ct. 851.

[8]House Journal of the thirty-first legislature of the state of Washington (1949), p. 1095. This report incorporated by reference two prior reports (First Report, Un-American Activities in Washington State, 1948, and Second Report, Un-American Activities in Washington State, 1948) of the committee which contained testimony adduced at its hearings, together with findings and conclusions drawn by the committee from that

After receiving and considering the committee's report, the thirty-first (1949) legislature adopted, as part of its general appropriations act, a proviso[9] (similar to that adopted by the 1947 legislature)[10] designed to prevent public funds from reaching public employees who advocated, or who were members of organizations that advocated, the overthrow of the government of the United States by force or violence.

In his message to the thirty-second legislature at the commencement of its regular session in January, 1951, the governor pointed out the national emergency then existing, its causes and potential effects, and the strategic geographical position of the state of Washington in any such emergency.[11] He further urged that appro-

testimony which appears as prefatory remarks therein. Pertinent excerpts from the committee's final report to the legislature, including the committee's conclusions prefacing these prior reports, are set out in appendix B.

[9]Laws of 1949, chapter 242, § 2, p. 948, thereof provided, in part: ". . . That no part of any appropriation contained in this act shall be used to pay the salary or wages of any person who . . . advocates, or is a member of an organization that advocates, the overthrow of the government of the United States by force or violence. . . ."

[10]Laws of 1947, chapter 287, § 2, p. 1334.

[11]House Journal of the thirty-second legislature of the state of Washington (1951), p. 23:

"Again we meet in a time of great national emergency.

"All of us had fervently hoped for a long respite from the waste and sacrifice of war and preparation for war. Our country had placed chief reliance in the United Nations to maintain world peace and order. We had disbanded our armies, decommissioned our fleets of ships and planes, dismantled our war plants, and turned our attention to the pressing problems of our civilian economy.

"But the evil menace of expanding communism would not have it so. While the rest of the world pursued a peaceful path, the forces of communism, bent upon a wholly different course, were gathering vast strength and power. Their method was regimentation, suppression, infiltration, intimidation and aggression. Their purpose was to push the

priate legislation be immediately enacted in order to curb subversive activities in this state, particularly in view of the then existing national emergency and the disclosures made through the efforts of the joint fact-finding committee on un-American activities (Canwell committee) created by house concurrent resolution No. 10.[12]

frontiers of that ideology so deeply into the territory and institutions of free nations, that all the world would fall an easy prey. Then came the day when the principles and authority of the United Nations were openly defied in the halls at Lake Success, and physically challenged on the Korean fields of battle.

"This nation and the world are now awake to the danger. We still hope to avert World War III. But it is so perilously close that our nation has already come virtually to a war footing. This is bringing with it a fundamental change in our civilian economy, with resulting burdens and sacrifices for all of us. If the emergency becomes more acute, developing into a global war, we all face the risk of great loss and suffering. We face these possibilities, not cheerfully, but with the determination to do what must be done to preserve, for our children, the way of life all of us so deeply cherish.

"It is in this setting that the Thirty-second Legislature of the State of Washington meets to discharge its legislative duties.

"Our state occupies a position of great importance in this emergency, as it did throughout World War II. It is a tremendous arsenal for military might. Its strategic geographical location, moreover, has special military signficance in any war with communism. . . ."

[12] *Ibid.* p. 30:

"To further strengthen our civil defense program, we also must be mindful of that small group of traitors within our citizenry who would destroy our freedom from within. In this connection I strongly urge that the legislature give thought to enactment of appropriate provisions for the curbing of subversive activity, and to protect our free institutions from perversion into weapons of aggression against us in the hands of our enemies.

"By Concurrent Resolution No. 10 the Thirtieth Legislature created the Joint Legislative Fact Finding Committee on Un-American Activities. Through the labors of this committee much was learned of the degree to which disloyal groups had infiltrated into organizations of our senior citizens, into various economic and educational groups. As the result of these disclosures, some remedial action was taken but in the light of the grave emergency which we now face, additional action must be taken immediately. Therefore a bill is being prepared calculated to give support at the state level to the efforts of our various federal agencies charged with the responsibility of combating these forces of tyranny and enslavement. . . ."

The subversive activities act originally passed by the legislature in 1951 consisted of twenty-two sections. Five of these (§§ 6, 7, 8, 10, and 21), containing administrative provisions, were vetoed by the governor.[13] The remaining seventeen sections became effective on March 19, 1951, upon executive approval.[14] Each of these sections falls into one of three general classifications: penal, administrative, or regulatory.

Sections eleven, twelve, thirteen, fourteen and seventeen bear directly upon the problem before us and are set out in the margin.[15] These sections impose conditions upon eligibility for public employment in sensitive occupations and require that all such state employees, or applicants for state employment, take an oath, subject to the penalties of perjury, as a prerequisite of public employment or the continuance thereof.

[13]Laws of 1951, chapter 254, §§ 6, 7, and 8, pp. 797, 798, § 10 p. 798, § 21, p. 802. Senate Journal of the thirty-second legislature of the state of Washington, p. 842.

[14]Laws of 1951, chapter 254, § 22, p. 803.

[15]Laws of 1951, chapter 254:

"Sec. 11. No subversive person, as defined in this act, shall be eligible for employment in, or appointment to any office, or any position of trust or profit in the government, or in the administration of the business, of this state, or of any county, municipality, or other political subdivision of this state. (*cf.* RCW 9.81.060)

"Sec. 12. Every *person* and every *board, commission, council, department, court or other agency* of the state of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall *establish by rules, regulations or otherwise, procedures designed to ascertain whether any person is a subversive person.* In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. (Italics ours.) (*cf.* RCW 9.81.070)

The terms "subversive person," "subversive organiza-

"Sec. 13. The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment, shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or any political subdivision thereof. (*cf.* RCW 9.81.080)

"Sec. 14. Every person who, on June 1, 1951, shall be in the employ of the state of Washington or of any political subdivision thereof, other than those now holding elective office shall be required on or before July 1, 1951, to make a written statement which shall contain notice that it is subject to the penalties of perjury, that he or she is not a subversive person as defined in this act; namely, any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of government of the United States, or of the state of Washington, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization, as more fully defined in this act. Such statements shall be prepared and execution required of and by every person and every board, commission, council, code department, court or other agency of the state of Washington or any subdivision thereof responsible for the supervision of other employees, for the employees under the jurisdiction thereof. Any such person failing or refusing to execute such a statement or who admits he is a subversive person as defined in this act shall immediately be discharged. . . .

"Sec. 17. Every written statement made pursuant to this act by an applicant for appointment or employment, or by any employee, shall be deemed to have been made under oath if it contains a declaration preceding the signature of the maker to the effect that it is made under the penalties of perjury. Any person who wilfully makes a material misstatement of fact (a) in any such written statement, or (b) in any affidavit made pursuant to the provisions of this act, or (c) under oath in any hearing conducted by any agency of the state, or of any of its political subdivisions pursuant to this act, or (d) in any written statement by an applicant for appointment or employment or by an employee in any state aid or private institution of learning in this state, intended to determine whether or not such applicant or employee is a subversive person as defined in this act, which statement contains notice that it is subject to the penalties of perjury, shall be subject to the penalties of perjury, as prescribed in chapter 9.72, R.C.W." (*cf.* RCW 9.81.110.)

tion," and "foreign subversive organization" (used in these five sections) are particularly defined in section one of the act. The definition of "subversive person" was amended in 1953[16] to specifically provide that a person must have knowledge that an organization is a "subversive organization" or "foreign subversive organization" (as elsewhere defined in section one) before such person becoming or remaining a member thereof can be deemed to be a "subversive person." (This 1953 amendment is a complete answer to respondents' argument in their brief concerning the alleged lack of *scienter* as an essential element in this section.) *Cf. Wieman v. Updegraff*, 344 U.S. 183, 97 L. Ed. 216, 73 S. Ct. 215 (1952).

With this legislative history and background in mind, we now turn to the consideration of Laws of 1955, chapter 377, which was held by the trial court to be unconstitutional in its entirety. As previously stated, this act consists of only four sections, of which the first two purport to amend sections twelve and thirteen of the 1951 act (RCW 9.81.070 and .080), and the latter two purport to add new sections thereto (*cf.* RCW 9.81.082 and .083). These latter two sections will be considered in the order ruled upon by the trial court and discussed by the respective parties in their briefs.

Section three of the amendatory act provides:

"For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations

[16]Laws of 1953, chapter 142, p. 273.

designated by the attorney general of the United States as being subversive pursuant to executive order No. 9835."

The trial court concluded that:

"Section 3 of chapter 377, Laws of 1955, constitutes an unconstitutional delegation of legislative authority to an officer of the United States over which the state government has no control and without adequate standards being set forth to guide such officer in the exercise of such delegation."

[1] Appellants first assign error to this conclusion. They argue that section three was merely an adoption by our legislature of a factual determination made by a foreign administration agency (U.S. attorney general). This argument is unappealing for at least three reasons:

(1) Executive order No. 9835, promulgated by the president of the United States on March 21, 1947 (5 U.S.C.A., § 631; 12 F.R. 1935; 3 C.F.R. 1943-1948 Comp. p. 627), was specifically revoked by executive order No. 10450 (5 U.S.C.A., § 631, 18 F.R. 2489, 3 C.F.R., 1953 Supp., p. 72), issued April 27, 1953 (almost two years prior to the enactment of § 3.

(2) The method followed by the attorney general for listing subversive organizations pursuant to executive order No. 9835 was held by the supreme court of the United States to be violative of the due process clause of the fifth amendment to the United States constitution in *Joint Anti-Fascist Refugee Committtee v. McGrath*, 341 U.S. 123, 95 L. Ed. 817, 71 S. Ct. 624 (April 30,

1951), which was almost four years prior to the enactment of § 3.

(3) Section three purported to include "membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive." This would include organizations listed by him *in futuro ad infinitum* Statutes attempting to adopt by reference future Federal rules, regulations or statutes are unconstitutional. *State ex rel. Kirschner v. Urquhart*, 50 Wn.(2d) 131, 310 P. (2d) 261 (1957).

Thus it is apparent that section three purported to adopt unconstitutional findings of the attorney general, promulgated pursuant to an executive order, which had been revoked and superseded long prior to the enactment of the 1955 act. We cannot, under the guise of judicial interpretation, interject executive order No. 10450 (and the due process procedure provided for the listing of subversive organizations thereunder) into section three, contrary to the express terms thereof. This section is, therefore, unconstitutional and void. *State ex rel. Kirschner v. Urquhart, supra.* For these reasons, the result reached by the trial court is correct, and appellants' first assignment of error cannot be sustained.

Appellants next assign error to the trial court's conclusion that:

"Section 4 of chapter 377, Laws of 1955, amends § 1, chapter 254, Laws of 1951, in that it adds a new category

of subversive organization and of subversive activity. This section, therefore, embraces subjects not set forth in the title to chapter 377, Laws of 1955, and is, therefore, unconstitutional."

(It must be noted that the court's reference in this conclusion to "§ 1, chapter 254, Laws of 1951" is inaccurate, in that it overlooks the fact that section one was previously amended by Laws of 1953, chapter 142, § 1, p. 273.)

Section four of the 1955 act provides:

"The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder."

Apparently, the above quoted conclusion of the trial court is based on Art. II, § 19, of the Washington constitution, requiring that:

"No bill shall embrace more than one subject, and that shall be expressed in the title."

If section four is in fact *amendatory* of a prior section of the subversive activities act, as the trial court concluded, it would also violate Art. II, § 37 of the Washington constitution, which provides:

"No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length."

[2] Respondents' argument is that section four amends the definition of "subversive organization" (Laws of 1953,

chapter 142, § 1; RCW 9.81.010) by establishing conclusively that the communist party is such an organization, thereby creating a "new and different crime" under Laws of 1951, chapter 254, § 3 (RCW 9.81.030). This contention is untenable.

Section four of the 1955 act is nothing more than the legislature's declaration of its recognition that the communist party falls within the definition of "subversive organization" contained in Laws of 1953, chapter 142, § 1. As such, it is supplementary rather than *amendatory*. Therefore, the sections of the act which it supplements need not be set out in full in order to satisfy the last mentioned constitutional requirement, because:

"... If the amendatory act only adds a new section to the old act, only the new section need be set forth in the body of the amendatory act." 1 Sutherland, Statutory Construction (3d ed.), 407, § 1928.
See, also, *State v. Lawson*, 40 Wash. 455, 82 Pac. 750 (1905); *State ex rel. Washington Toll Bridge Authority v. Yelle*, 32 Wn.(2d) 13, 200 P.(2d) 467 (1948); *Bellingham v. Hite*, 37 Wn.(2d) 652, 225 P.(2d) 895 (1950).

[3] Laws of 1955, chapter 377, is entitled:

"An Act relating to subversive activities; requiring state, county and municipal employers to ask employees under oath concerning memberships in *the communist party or other subversive groups*; and amending ..." (Italics ours.)

The single subject of the entire act, "subversive activities," is "expressed in the title" as required by Art. II,

§ 19, of the state constitution. That part of the title above italicized characterized the communist party as a "subversive group" and gives sufficient notice of the contents of section four.

We are of the opinion that the title of the 1955 act does not violate either of the constitutional provisions above discussed and that the trial court's conclusion, holding to the contrary, is erroneous.

Error is next assigned to the trial court's conclusion that:

"Chapter 377, Laws of 1955, is unconstitutional in its entirety . . . because . . . §§ 3 and 4 of the chapter are not separable from the first two sections."

[4] In *In re Hendrickson*, 12 Wn.(2d) 600, 123 P. (2d) 322 (1942), we recognized that the ultimate test of separability is the intention of the legislature, as determined by the court, and restated the rule to be:

". . . that the entire statute will fall where the constitutional and unconstitutional provisions are so connected and interdependent in subject matter, meaning, and purpose that it cannot be believed that the legislature would have passed the one without the other, or where the portion eliminated is so intimately connected with the rest of the statute as to make it useless to accomplish any of the purposes of the legislature. [Citations.]"

[5] Applying these principles to the 1955 act, we find that when sections one and two thereof are substituted for sections twelve and thirteen of the act of 1951,

which they amend, the legislature has stated its intention in section eighteen of the original act that these sections be considered separable. While such a saving clause is not conclusive, it does give us assurance that the legislature would have passed the act even though it knew that section three were to be eliminated. See *State ex rel. King County v. State Tax Comm.*, 174 Wash. 336, 24 P.(2d) 1094 (1933). But apart from this, our analysis of the purpose of the several sections of the 1955 act clearly manifests the intention of the legislature that these sections be separable and are capable of functioning independently of each other.

[6] Sections one, two, and four of the 1955 act relate to subversive activities generally, and to the communist party particularly. Section three, however, pertains to subversive activities generally and, in particular, is nothing more than an abortive attempt on the part of the legislature to designate by reference about 250 other organizations as subversive within the definition contained in section one of the 1951 act, as amended by Laws of 1953, chapter 142, § 1 (*cf.* RCW 9.81.010). By designating the communist party as a subversive organization in section four, the legislature supplied the reason why it required in section one, as a condition of public employment, that every present and prospective public employee state, under oath, whether he or she was then a member of the communist party, except in nonsensitive occupations, as provided in section two. Obviously, sections one and four were designed to prevent

any claim (which the legislature found to be entirely unfounded in fact) that the communist party was not, and is not, a "subversive organization" as defined in the 1951 act, as amended.

It is thus apparent that the invalidity of section three does not vitiate the remainder of the 1955 act. Absent section three, the entire subversive activities act (including the amendments made by section one, two, and four of the 1955 act) can be administered in precisely the same manner as with section three, with the single exception that no list of alleged subversive organizations prepared by the United States attorney general may be used to designate membership in proscribed organizations. Since section three of the 1955 act is clearly separable and a workable statute remains after its severance, we cannot sustain the above quoted conclusion of the trial court.

[7] Respondents further argue that "the state has no power to enact a subversive activities control statute." They cite *Pennsylvania* v. *Nelson*, 350 U. S. 497, 100 L. Ed. 640, 76 S. Ct. 477 (1956), wherein the defendant was charged and convicted in the Pennsylvania *state* court with an attempt to overthrow the government of the *United States* by force and violence contrary to the Pennsylvania sedition act of 1949. The United States supreme court (affirming the decision of the supreme court of Pennsylvania) there held that certain *Federal* legislation had pre-empted the field of sedition against the *United*

States.[17] As we understand that case, the court did not hold, either expressly or by implication, that a sovereign state was precluded from enacting laws designed to suppress acts of sedition against the state itself. Moreover, the *Nelson* case had no relation whatever to, and did not involve, the power of a state to enact state laws and regulations prescribing qualifications prerequisite to public employment. But even if we assume, *arguendo*, that Federal legislation has pre-empted the field of sedition against both *Federal and state* governments, still that which has just been said above concerning separability of the 1955 act applies with equal force to the separability of the penal sections (§§ 2 and 3) of the 1951 act from those sections (§§ 1 and 2 of the 1955 act) prescribing qualifications for public employment.

Respondents complain that the statute[18] which requires them to execute the oath in question is a bill of attainder and, as such, contravenes Art. I, § 23, of the state constitution and Art. I, § 10, of the United States constitution.[19] Their argument is substantially the same as that rejected in this court in *Huntamer v. Coe*, 40 Wn.(2d) 767, 246 P.(2d) 489 (1952), wherein we held that section 16, as implemented by section 1(e), of the act of

[17]See *State v. Diez* (Fla.) 97 So.(2d) 105 (1957) for a comprehensive discussion of the inapplicability of the *Nelson* case to state statutes prescribing conditions precedent to public employment.

[18]Laws of 1951, chapter 254, § 12, as amended by Laws of 1955, chapter 377, § 1.

[19]"No bill of attainder, ex post facto law . . . shall ever be passed." Art. I, § 23, of the Washington constitution.

"No state shall . . . pass any bill of attainder, ex post facto law, . . ." Art. I, § 10, of the United States constitution.

1951 (requiring a similar oath as a condition precedent to filing a declaration of candidacy for any public office) was not unconstitutional for these reasons.

[8] Section twelve of the 1951 act, as amended by Laws of 1955, chapter 377, § 1, requires only that every present or prospective public employee state, under oath, whether he or she is "a member of the communist party or other subversive organization" at the time the oath is taken. No punishment for past conduct or political activity is involved. Only one qualification precedent to public employment is imposed. In short, this section is clearly neither *ex post facto* nor in the nature of a bill of attainder. *Huntamer v. Coe, supra; Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716, 95 L. Ed. 1317, 71 S. Ct. 909 (1951); *American Communications Ass'n v. Douds*, 339 U. S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949); *Pickus v. Board of Education of Chicago*, 9 Ill.(2d) 599, 138 N. E.(2d) 532 (1956).

[9] Nor do we find merit in respondents' assertion that section twelve, as amended, violates Art. I, § 9, of the Washington constitution[20] or that clause of the fifth amendment to the United States constitution which provides that no person "shall be compelled in any criminal case to be a witness against himself." Respondents are not compelled by section twelve to do anything. But, if they desire to remain in public employment, they must comply with the standards of eligibility established

[20] "No person shall be compelled in any criminal case to give evidence against himself, or be twice put in jeopardy for the same offense." Art. I, § 9, of the Washington constitution.

by the legislature, and their refusal to do so renders them ineligible for further employment.

Respondents also attack the oath requirement of the act, contending that it abridges their rights of freedom of speech and assembly protected by Art. I, §§ 4 and 5, of the Washington constitution,[21] and the first and fourteenth amendments to the United States Constitution.[22]

Pickus v. Board of Education of Chicago, supra, was an action for a declaratory judgment and an injunction holding unconstitutional, and restraining the enforcement of, that section of the Illinois finance act of 1955 which required all public employees to execute a "non-communist affidavit" as a condition precedent to receiving compensation for their services from the state or its political subdivisions. In the course of its opinion, holding the section involved to be constitutional, the Illinois supreme court, speaking through Chief Justice Klingbiel, said:

"Plaintiffs assert that section 30b is an unwarranted denial of the right to speak. They fail to point out, however, the respect or way in which they consider such right to be involved here. The statute simply provides

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[21]"The right of petition and of the people peacefully to assemble for the common good shall never be abridged." § 4.

"Every person may freely speak, write, and publish on all subjects, being responsible for the abuse of that right." § 5.

[22]"Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances." Art I.

for the execution of an affidavit of fact. It does not purport to limit or restrict the right of employees to speak or assemble."

And, in *Albert Appeal*, 372 Pa. 13, 92 A.(2d) 663 (1952), a teacher in the Pittsburgh public school system was dismissed and her contract terminated by the board of education after a hearing on charges preferred by the superintendent of schools of Pittsburgh that she was a communist, and for "advocation of or participating in un-American or subversive doctrines." In affirming the decision dismissing the teacher's appeal, the court said:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Art. XIV, § 1.

"There is no question of the right of free speech involved in this case. Miss Albert is not being penalized in her capacity *as a private citizen* because of any political, economic or social views she may entertain or any expression she may care to give to those views. The concern here is with her rights as a *teacher*, and the legislature can certainly prescribe qualifications for teachers in the public schools with respect not only to their academic attainments but also to their moral characters and their loyalty to the state and federal governments. Judge (later Mr. Justice) Holmes, in a characteristically epigrammatic phrase, said in *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517: 'The pe-

titioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.' To the same effect, Mr. Justice Minton, speaking for the United States Supreme Court, said in *Adler v. Board of Education of the City of New York*, 342 U. S. 485, 492 [96 L. Ed. 517, 524, 27 A. L. R.(2d) 472, 476 (1952)]: 'It is clear that such persons [employed or seeking employment in the public schools] have the right under our law to assemble, speak, think and believe as they will. . . . It is equally clear that they have no right to work for the State in the school system on their own terms. . . . If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not.'"

After stating the matter just quoted, the United States supreme court, in the *Adler* case, went on to say:

"If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed [subversive] organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend

its own existence."

In *Fitzgerald v. Philadelphia*, 376 Pa. 379, 102 A.(2d) 887 (1954), a nurse, who had been dismissed from her employment in the Philadelphia General Hospital for declining to take the oath required by section five of the Pennsylvania loyalty act of 1951,[23] sought reinstatement. In affirming a judgment adverse to her, the supreme court of Pennsylvania said:

"We do not understand that appellant argues—or indeed could argue—that the Commonwealth or any of its political subdivisions cannot refuse employment, or discontinue it, in the case of anyone who is knowingly a member of a subversive organization. It would be intolerable for any government to retain in its employ one who advocates its overthrow by force or violence or knowingly consorts with others in an organization having such an objective. What we held in *Albert Appeal*, 372 Pa. 13, 92 A.(2d) 663, and what the Supreme Court of the United States held in *Adler v. Board of Education of the City of New York*, 342 U. S. 485, in regard to teachers applies equally to all public employees, namely, that the legislature, as a condition of their employment, may prescribe qualifications with respect not only to their general attainments but also to their moral character and their loyalty to the state and federal government, and, to that end, may deny them public employment if they are knowingly members of a disloyal and seditious

[23]It is significant to note that the statute there involved is strikingly similar to section twelve of the subversive activities act which is involved in this case.

organization. . . . That being so, the oath prescribed by the 1951 Act is obviously justified for the purpose of informing the appointing authority as to whether the employee is in fact a member of an organization which he knows is subversive in character and therefore is not a fit person to be entrusted with the duty of supporting and advancing the interests of the very government whose destruction he is seeking to accomplish."

Shortly after this case was argued in this court, the supreme court of the United States rendered its decisions in *Beilan v. Board of Education*, 357 U. S. 399, 2 L. Ed. (2d) 1414, 78 S. Ct. 1317 (1958), and *Lerner v. Casey*, 357 U. S. 468, 2 L. Ed.(2d) 1423, 78 S. Ct. 1311 (1958). In the former, a teacher was discharged by the board of education on its finding of "incompetency" because of his refusal to answer questions relating to his past communistic affiliations and activities. In upholding the decision of the Pennsylvania supreme court, sustaining the board's action, the United States supreme court carefully pointed out that the teacher was discharged not for disloyalty, but for "incompetency," and that such discharge did not violate the due process clause of the fourteenth amendment.

In the *Lerner* case, the court upheld a judgment of the New York court of appeals, which had the effect of sustaining the dismissal of a subway conductor, employed by the New York City Transit Authority, who, when asked (by the commissioner of investigation of New York City) whether he was *then* a member of the

communist party, refused to answer, claiming his privilege against self-incrimination under the fifth amendment. He was subsequently suspended, and later discharged. A finding " 'that, upon all the evidence, reasonable grounds exist for belief that, because of his doubtful trust and reliability . . .' [his] continued employment would endanger national and state security," was based on his refusal to answer the question asked. The supreme court acepted the reasoning of the court of appeals that the city employee had been discharged neither

". . . because of any inference of Communist Party membership which was drawn from the exercise of the Fifth Amendment privilege [which, the court pointed out, was not available to appellant through the fourteenth amendment in this city investigation], nor because of the assertion of that constitutional protection, but rather because of the doubt created as to his 'reliability' by his refusal to answer a relevant question put by his employer. . . ."

Like the *Lerner* case, *supra*, the question which section twelve of our 1951 act, as amended in 1955, requires respondents to answer is whether or not they *are* members of the *communist party*, or other subversive organization.

That the communist party was, in fact, a subversive organization, as defined in the 1951 act, at the time that our legislature designated it as such (by § 4 of the 1955 act) can scarcely be doubted. (See appendix C.)

[10] Even prior to the commencement of hostilities

in Korea in 1950, numerous judges had recognized the communist party as a part of a world conspiracy having as its prime objective the overthrow of the United States government by force and violence, or whatever means possible, constitutional or otherwise.[24] Since then, Congress, in 1950, enacted legislation designed to control the communist party,[25] and, in 1954, proscribed it.[26] The courts of New Jersey[27] and Pennsylvania[28] take judicial notice of the fact. We can, and do now, hold likewise, because the fact that the communist party is a subversive organization is now a matter of common knowledge.

[11] It is settled law that the state may inquire of its employees regarding matters that may prove relevant to their fitness and suitability for public service. *Adler v. Board of Education, supra; Garner v. Los Angeles Board of Public Work, supra.* Particularly is this true with respect to the employment of teachers in its public schools and institutions of higher learning. The reasons compelling this conclusion are aptly pointed out by the New Jersey supreme court in *Laba v. Newark Board of Education*, 23 N. J. 364, 129 A.(2d) 273 (1957), which

[24]E.g., Concurring opinion of Mr. Justice Jackson in *American Communications Ass'n v. Douds*, 339 U. S. 382, 94 L. Ed. 925, 70 S. Ct. 674; dissenting opinion of Mr. Chief Justice Stone in *Schneiderman v. United States*, 320 U. S. 118, 87 L. Ed. 1796, 63 S. Ct. 1333 (1942); dissenting opinions in *State ex rel. Huff v. Reeves*, 5 Wn. (2d) 637, 106 P.(2d) 729, 130 A. L. R. 1465 (1904).

[25]Title I (the subversive activities control act of 1950) of the internal security act of 1950 (the McCarran act) of September 23, 1950, 64 Stat. 987, 50 U. S. C. A., § 781, *et seq.*

[26]Communist control act of 1954 of August 24, 1954, 68 Stat. 775, 50 U. S. C. A., § 841, *et seq.*

[27]*Laba v. Newark Board of Education*, 23 N. J. 364, 129 A.(2d) 273 (1957).

[28]*Albert Appeal*, 372 Pa. 13, 92 A.(2d) 663 (1952).

quoted with approval from *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498, 79 A.(2d) 462 (1951), judgment vacated as moot, 342 U. S. 803, 96 L. Ed. 608, 72 S. Ct. 35 (1951), as follows:

"The maintenance of the purity of the educational process against corruption by subversive influences is of the highest concern to society. It is in no real sense a denial of academic freedom to require of a teacher, as a condition to employment, a sworn disavowal of allegiance to the doctrine of force or violence as a mode of overthrowing government. That would seem to be axiomatic. Loyalty to government and its free democratic institutions is a first requisite for the exercise of the teaching function. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications. The apprehended danger is real and abiding. We have long had evidences of the pressure here of a godless ideology ruthlessly fostered by a foreign power which has for its aim the violent overthrow of government and free society. And one of its weapons is the debasement of teaching as a softening measure in the consummation of the subversive process. The school system affords the opportunity and means for subtle infiltration. *There is no intrusion upon personal freedoms when government intervenes, as it has here, to avert this peril to its very existence. A teacher who is bereft of the essential quality of loyalty and devotion to his government and the fundamentals of our democratic society is lacking in a basic qualification for teaching.* The teacher is not obliged to

take the oath; but if he refuses to do so he is not entitled to teach. In the current struggle for men's minds, the State is well within its province in ensuring the integrity of the educational process against those who would pervert it to subversive ends." (Italics ours.)

In *Adler v. Board of Education, supra,* the supreme court said:

"... A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. *In this, the state has a vital concern.* It must presereve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted. One's associates, past and present, as well as one's conduct, may properly be considered in determining fitness and loyalty. From time immemorial, one's reputation has been determined in part by the company he keeps. In the employment of officials and teachers of the school system, the state may very properly inquire into the company they keep, and we know of no rule, constitutional or otherwise, that prevents the state, when determining the fitness and loyalty of such persons, from considering the organizations and persons with whom they associate." (Italics ours.)

In this case, because of their positions in a "sensitive" area, each respondent is required, by section twelve of the 1951 act, as amended in 1955, to state, upon oath,

whether he is a member of the comumnist party or other subversive organization.

[12] The foregoing authorities clearly hold that, without violating any of the constitutional rights here invoked by respondents, the state is entitled to ask this question and to demand an answer as a condition of continued employment. Refusal to answer is sufficient grounds for discharge, whether it be for "incompetency" *(Beilan v. Board of Education, supra)*, or because by his lack of candor he provides evidence of his "doubtful trust and reliability." *(Lerner v. Casey, supra.)*

[13] Respondents also contend that the form of oath which appelants demanded that they sign violates the due process clause of the fourteenth amendment[29] to the United States constitution, and Art. I, §§ 3 and 12,[30] of the state constitution, in failing to include the element of *scienter* of the subversive character of a subversive organization on the part of the prospective affiant. As we interpret the form of oath, we find that this element is implied in every clause thereof and of the pertient statutory provisions. See *Garner v. Board of Public Works of Los Angeles, supra.* As so construed, the case for *Wieman v. Updegraff, supra*, on which respondents rely, has no application.

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[29]See note 21, *supra*.

[30]"No person shall be deprived of life, liberty, or property without due process of law." Art. I, § 3, of the Washington constitution.

"No law shall be passed granting to any citizen, class of citizens, or corporation, other than municipal, privileges or immunities which, upon the same terms, shall not equally belong to all citizens or corporations." Art. I, § 12, of the Washington constitution.

Conclusion

No authority, state or Federal, has been called to our attention (and we have discovered none from our own research) holding either:

(a) That the states have been deprived of their control over public schools or institutions of higher learning operated by them, including the power to protect the students therein against the possible exertion of subversive influence by their teachers or other instructors; *or*

(b) That the states have been deprived of the right to investigate the qualifications (including loyalty) of their employees who are paid by public funds.

[14] In the absence of such authority, this court must hold that all of the provisions of the Laws of 1955, chapter 377, *except* section three thereof, are a valid exercise of the sovereign power of the state for the protection of the state of Washington and its existing educational institutions, and their respective students, under the tenth amendment to the United States constitution, reading as follows:

"The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

We are further of the opinion that the 1955 act (except for § 3) does not in any respect contravene any of the provisions of our state constitution or of the United States constitution which have been invoked by respondents.

It follows from what has been said herein that the action of appellants in demanding that respondents sign the form of oath attached to the complaint was correct.

The decree of the trial court is reversed with directions to dissolve the permanent injunction restraining appellants from performing their official duties under the 1955 act (except § 3) with respect to respondents and to dismiss their action.

Neither party shall be allowed costs in this court.

ALL CONCUR.

APPENDIX A

Excerpts from House Concurrent Resolution No. 10, Laws of 1947, p. 1378.

"WHEREAS, These are times of public danger, subversive persons and groups are endangering our domestic unity, so as to leave us unprepared to meet aggression, and under cover of the protection afforded by the bill of rights these persons and groups seek to destroy our liberties and our freedom by force, threats and sabotage, and to subject us to the domination of foreign powers; and

"WHEREAS, Recent announcements by responsible officers of the federal government indicate the seriousness of the problem. J. Edgar Hoover, Director of the Federal Bureau of Investigation,* recently said: 'During the

*In 1957, after nearly forty years' experience in dealing with communist activities in the United States, Mr. Hoover reported to the American public on this subject in "Masters of Deceit" (Library of Congress Catalog Card No. 58-7643). For a description of communist party operations in the United States, see parts II, III, and IV.

past five years American Communists have made their deepest inroads upon our national life. Their propaganda, skillfully designed and adroitly executed has been projected into practically every phase of our national life. The Communist influence has projected itself into some newspapers, books, radio and the screen, some churches, schools, colleges and even fraternal orders have been penetrated, not with the approval of the rank and file, but in spite of them'; and

"WHEREAS, State legislation to meet the problem and to assist law enforcement officers can best be based on a thorough and impartial investigation by a competent and active legislative committee;

"*Now, Therefore, Be It Resolved*, That there is hereby created a Joint Legislative Fact-finding Committee on Un-American Activities in the State of Washington which shall investigate, ascertain, collate and appraise all facts concerning individuals, groups or organizations whose activities are such as to indicate a purpose to foment internal strife, discord and dissension; infiltrate and undermine the stability of our American institutions; confuse and mislead the people; and impede the normal progress of our state and nation either in a war time or a peace time economy; and

"*Be It Further Resolved*, That in addition to other duties imposed upon the committee, the committee shall investigate the activities of groups and organizations whose membership includes persons who are communists, or any other organization known or suspected to be dom-

inated or controlled by a foreign power, which activities affect the conduct of this state, the functioning of any state agency, unemployment relief and other forms of public assistance, educational institutions of this state supported in whole or in part by state funds, or any political program; and

"*Be It Further Resolved*, That the committee shall consist of four members of the House of Representatives, appointed by the speaker thereof; and three members of the Senate appointed by the president thereof and they shall be subject to confirmation of their respective bodies. The speaker of the House of Representatives shall appoint the chairman of the board; and

"*Be It Further Resolved*, That the committee hereby created . . . shall have . . . all powers necessary or convenient to accomplish the objects and purposes of this resolution, including but not limited to the following duties and powers: . . .

"(5) To hold public hearings at any place in the State of Washington at which hearings the people are to have an opportunity to present their views to the committee;

"(6) To make a complete study, survey and investigation of every phase of the subject of this resolution, including but not limited to the operation, effect, administration, enforcement, and needed revision of any and all laws in anywise bearing upon or relating to the subject of this resolution;

"(7) To meet at any and all places in this state, in

public or executive session;

"(8) To act during this session of the legislature, including any recess hereof, and after final adjournment hereof until commencement of the thirty-first legislature;

"(9) To file a report with the thirty-first legislature . . ."

Appendix B

I.

Pertinent prefatory remarks of the Joint Fact-finding Committee on Un-American Activities in the State of Washington addressed to the Speaker of the House of Representatives and the Thirtieth Legislature, contained in the First Report, Un-American Activities in Washington State, 1948, are as follows:

"The testimony and evidence in the first hearings prove conclusively, in the judgment of your Committee, that:

"1. Communists in the State of Washington operate under, and undeviatingly follow, policies laid down for them by the Soviet government.

"2. These policies are promulgated on a nation-wide basis and that the activities of Communists in the State of Washington are coordinated with Communist activities in the other states of the union.

"3. The dovetailed nation-wide program is designed to create distrust of their form of government in the minds and hearts of the American people; create unrest and civil strife, and impede the normal processes of

state and national government, all to the end of weakening and ultimately destroying the United States as a constitutional republic and thereby facilitating the avowed Soviet purpose of substituting here a totalitarian dictatorship.

"Fantastic as this may appear to the uninitiate and the naive, the testimony produced at the public hearings clearly brings into view the extreme danger of the Soviet directed Communist conspiracy to the peace and security of the people of the State of Washington and the United States."

II.

Salient prefatory remarks of the above mentioned committee address to the Thirty-first Legislature of the State of Washington, contained in the Second Report, Un-American Activities in Washington State, 1948, are:

"The hearing, conducted by a legally appointed committee of the legislature, met with much resistance and actual sabotage in its proceedings. Under the guise of a 'picket line' Communist inspired marchers surrounded the 146th Field Artillery Armory, scene of the hearing, and raised their voices in shouting in an obvious attempt to drown out the testimony of witnesses.

"Seattle police arrested ringleaders of the demonstrations on charges of disorderly conduct. Joint efforts of Seattle police and the State Patrol were necessary to quell the disturbances so that your Committee could carry on its hearings in an orderly manner.

"While the number of University faculty members exposed as having or having had Communist Party affiliations was relatively small compared with the actual size of the faculty, the hearing developed that the pattern of Communist infiltration was identical with that employed by the Communists in other fields.

"In virtually every field in which they ultimately have been the dominating influence the Communists start with a small but active minority who almost invariably conceal their affiliations and operate as so-called 'liberals.'

"Your Committee wishes to direct particular attention to the testimony concerning not only the University of Washington but to the proven Communist domination of the Repertory Playhouse, an off-campus school of the drama, which has drawn many of its students from the University. Testimony concerning the affiliation of the leadership of this school with Communist activities is preponderant, and, to the uninitiate, startling in the extreme."

III.

Excerpts from the Report of Un-American Activities Committee to the Thirty-first Legislature of the State of Washington (House Journal, 1949, P. 1095, *et seq.*):

"... The State of Washington is acrawl with trained and iron disciplined Communists. They have operated here with seeming immunity. Many of them hold almost impregnable positions of confidence and trust in their communities. They have successfully infiltrated their constant objectives, education, government, labor and mu-

nicipal services. They effectively operate and manipulate an incredible maze of propaganda outlets known as Communist Front Organizations.

"If the Communists are permitted to work unhampered a short time more in American education, the significance of our historic background will be almost completely lost to a generation of Americans. Our endeavors in uncovering Communist activity in education were largely confined to disclosure of evidence showing that Communists agents are being employed by this state in tax supported institutions.

"We did not at this time investigate to any great extent the substance of any teaching. We felt it sufficient to disclose the aims of the Communists in education and point out the rigid discipline and control held by the Party over its members. It then becomes obvious that a member of the Communist Party could not possibly shed his communism on entering the classroom. That as a Communist he is dedicated to the overthrow of the system and state employing him. That as a Communist he has subordinated his belief in academic freedom to the will of the Communist Party. By his own consent he is no longer a free agent and when he talks of academic freedom and civil rights it becomes the rankest hypocrisy. . . .

"Early in our investigations it became apparent that a large and well-organized group of disciplined Communists are operating in the State of Washington and have been for many years. These Communists are agents of Soviet

Russia through their membership and strict loyalty to the Communist Party. Some are aliens, more are American born, but all are alike in their undeviating obedience to the dictates of the Kremlin laid down to them in what is known as the Party Line.

"Every Communist and Communist sympathizer is a a potential saboteur and spy and it is the rankest nonsense to finance this program of self-destruction with public funds. An alarming number of Communists are on federal, state and municipal payrolls.

"The predatory nature of the world Communist Party is well attested to by many former Communists in the transcripts of our two public hearings which are appended to and made a part of this report. They are identified as 'First Report on Un-American Activities in Washington State' and 'Second Report on Un-American Activities in Washington State.'

"In addition to the printed reports of testimony taken at our two public hearings, the Committee has accumulated an index file of approximately 40,000 subjects dealing with Communists, their Front Organizations and activities and related materials. In the case of notorious Communists such as . . . [certain persons named], their cards may have scores of individual notations and cross references. We have found a pattern of Communist intrigue and conspiracy of alarming proportions extending over the State of Washington and the Pacific Northwest like a huge spider web. The cables of this web are imbedded deep in federal, state, and municipal government, all levels

in education, state welfare programs, labor organizations and religion. . . .

"While engaged in an intensive investigation in these two fields of Communist activity, it became increasingly apparent that all Communist activity in all fields is interrelated. That Communist agents while assigned to different projects are all dedicated to the same objective; the softening up of our people for the eventual violent overthrow of our government. That they work as a team taking their orders from the top, and that they do not deviate in the minutest detail from the Party Line and Party instructions. This may involve the following out of some minor Party assignment in a labor organization, outside speaking engagements for a university professor, or obedience to accepted Party conduct before a legislative hearing. No deviation from Party instructions is permitted—none occurs. . . ."

(For the committee's remarks concerning "Academic Freedom," particularly with reference to its investigation of subversive activities at the University of Washington, see that subheading in its report commencing on page 1110 (House Journal, 1949), and the letter of Raymond B. Allen, then president of the University of Washington, set out at length therein.)

Continuing the quote from the aforementioned report, at page 1117 of the House Journal (1949):

"J. Edgar Hoover is one of the outstanding and most vocal enemies of the Communists and has repeatedly

stated that the members of the Communist Party in America are fifth column agents representing a hostile government. . . .

"In reply to a question regarding the initiation of criminal prosecutions by the FBI in cases where federal employees failed to disclose Communist Party affiliations, Mr. Hoover stated:

" 'Criminal prosecutions are initiated in proper cases, but not by the FBI. That is a responsibility of the prosecuting officials of the Department of Justice and the various United States attorneys. It's not a simple matter to prove that one is a Communist. In fact, the most dangerous Communists in the nation today are not the open, avowed card-carrying Party members. They seek to attach themselves to liberal and progressive movements. They conceal their real Communist affiliations, because they know that once exposed they will outlaw themselves in the hearts and minds of Loyal Americans. A real Communist supporter can be identified by his acts —he follows his party line, espouses the Party's causes and often furthers its aims by his overt acts.

" 'The Communist Party has long regarded infiltration of the government service as a project carrying highest priority. They have sought to accomplish this under the guise of secrecy. The menace of Communists in government service is a threat to our national security because of (1) opportunity to engage in espionage to the detriment of our national defense; (2) opportunity to influence the formulation and carrying out of governmental

policies; (3) opportunity to promote Communist propaganda, creating disruption and undermining public confidence; (4) opportunity to recruit Party members in government service, or soliciting the aid of innocent coworkers in assisting them to carry out Party assignments; and (5) opportunity to place other Communists in government service. One person whose loyalty to the Communist cause exceeds his loyalty to the United States could, if properly placed, do irreparable harm to our security.'"

The committee recommended, *inter alia:*

"(11) To press with all vigor and energy and all its resources the investigation into Communism in our tax-supported schools, both common schools and institutions of higher learning. Communists already have made salutary inroads into our education system. Testimony, including that of high ex-Communists, in the first and second committee reports, disclose the alarming progress that has been made.

"In the blue print for Communist infiltration the Communist objective is summed up in these simple words:

"'In destroying the capitalist monoply of the means of production, the working class must also destroy the capitalist monoply of education; that is, it must take possession of all the schools.' "(Program of the Communist International, adopted by the Sixth World Congress, Sept. 1, 1928, Moscow. 'Blue Print for World Conquest,' page 206.)

"As heretofore stated, your Committee had opportunity merely to scratch the surface of Communist infiltration in our tax-supported school system.

"(12) The successor committee, or a separate committee be authorized to fully investigate the manner in which textbooks and all other reading matter in our schools is chosen and approved, and that the Legislature make it mandatory to either delegate existing agencies or create a separate agency with the responsibility of stemming the flow of subversive reading matter that is finding its way into some of the classrooms of our schools.

Appendix C

I.

Schwartz, the Supreme Court, chapter 9, page 317:

"Perhaps the most striking judicial statement of the actual character of the American Communist Party is to be found in a 1950 opinion of Justice Jackson [concurring opinion in *American Communications Ass'n v. Douds*, 339 U. S. 382, 413, 94 L. Ed. 925, 70 S. Ct. 674 (1949)], which is remarkable for the breadth of its language and its judicial notice of data not in evidence before the Court.

"From information before its several Committees [reads the opinion referred to], and from facts of general knowledge, Congress could rationally conclude that, behind its political party facade, the Communist Party is a conspiratorial and revolutionary junta, organized to reach ends

and to use methods which are incompatible with our constitutional system. A rough and compressed grouping of this data would permit Congress to draw these important conclusions as to its distinguishing characteristics.

"1. The goal of the Communist Party is to seize powers of government by and for a minority rather than to acquire power through the vote of a free electorate. . . .

"2. The Communist Party alone among American parties past or present is dominated and controlled by a foreign government. . . .

"3. Violent and undemocratic means are the calculated and indispensable methods to attain the Communist Party's goal. It would be incredible naivete to expect the American branch of this movement to forego the only methods by which a Communist Party has anywhere come into power.

"4. The Communist Party has sought to gain this leverage and hold on the American population by acquiring control of the labor movement. . . .

"5. Every member of the Communist Party is an agent to execute the Communist program.

"Although unsupported by the kind of evidence that would usually be required in a law court, the broad indictment of the Communist Party in Justice Jackson's opinion comports with the common sense of the subject. . . ."

II.

Report of (United States) House of Representatives Committee on Un-American Activities relative to the Internal Security Act of 1950 (House Report No. 2980, dated August 22, 1950):

"NECESSITY FOR LEGISLATION

"The need for legislation to control Communist activities in the United States cannot be questioned.

"Over 10 years of investigation by the Committee on Un-American Activities and by its predecessor committee has established (1) that the Communist movement in the United States is foreign-controlled; (2) that its ultimate objective with respect to the United States is to overthrow our free American institutions in favor of a Communist totalitarian dictatorship to be controlled from abroad; (3) that its activities are carried on by secret and conspiratorial methods; and (4) that its activities, both because of the alarming march of Communist forces abroad and because of the scope and nature of Communist activities here in the United States, constitute an immediate and powerful threat to the security of the United States and to the American way of life.

"The Communist program of conquest through treachery, deceit, infiltration, espionage, sabotage, corruption, and terrorism has been carried out in country after country and is an ever-growing threat to the national security of this and other countries. There is ample evidence that one of the primary objectives of the world Communist movement, directed from within the most powerful exist-

ing Communist totalitarian dictatorship, is to repeat this pattern in the United States.

"There is incontrovertible evidence of the fact that the Communist Party of the United States is dominated by such totalitarian dictatorship and that it is one of the principal instrumentalities used by the world Communist movement, in its ruthless and tireless endeavor to advance the world march of communism.

"The findings which support these conclusions, and the vast quantity of evidence on which they are based, are set forth in detail in the numerous reports which this committee and its predecessors have printed and circulated. Corroboration has been supplied by independent and exhaustive research by other committees of Congress.

"Concern over this threat is not limited to the legislative branch of our Government. At the present time 30 of the 70 major countries in the world have outlawed the Communist Party. Many other countries have adopted various legislative decrees against communism, and since 1947 the trend has been toward declaring all Communist activities illegal. Panama was the latest to take such action. This action came in April of this year. . . .

"Concern over the Communist threat has not been overlooked by the different State legislatures. At the present time 33 States have laws against the displaying of the 'Red' flag; 12 States have criminal anarchy laws; 16 have criminal syndicalism laws; 22 have sedition laws; 16 have laws against the Communist Party candidates

appearing on the election ballot; 19 States exclude Communists from public employment; 28 States require loyalty oaths of all employees; and 20 States require teachers to take loyalty oaths."

III.

Communist Control Act of 1954, August 24, 1954, chapter 886, § 2, 68 Stat. 775, 50 U. S. C. A., § 841.

"Sec. 2. The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. It constitutes an authoritarian dictatorship within a republic, demanding for itself the rights and privileges accorded to political parties, but denying to all others the liberties guaranteed by the Constitution. Unlike political parties, which evolve their policies and programs through public means, by the reconciliation of a wide variety of individual views, and submit those policies and programs to the electorate at large for approval or disapproval, the policies and programs of the Communist Party are secretly prescribed for it by the foreign leaders of the world Communist movement. Its members have no part in determining its goals, and are not permitted to voice dissent to party objectives Unlike members of political parties, members of the Communist Party are recruited for indoctrination with respect to its objectives a..d methods and are organized, instructed, and disciplined to carry into action slavishly the assignments given them by their hierarchical chieftains. Unlike political parties, the Com-

munist Party acknowledges no constitutional or statutory limitations upon its conduct or upon that of its members. The Communist Party is relatively small numerically, and gives scant indication of capacity ever to attain its ends by lawful political means. The peril inherent in its operation arises not from its numbers, but from its failure to acknowledge any limitation as to the nature of its activities, and its dedication to the proposition that the present constitutional Government of the United States ultimately must be brought to ruin by any available means, including resort to force and violence. Holding that doctrine, its role as the agency of a hostile foreign power renders its existence a clear present and continuing danger to the security of the United States. It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services. Therefore, the Communist Party should be outlawed."

APPENDIX B

DECISION OF THE WASHINGTON STATE SUPREME COURT

[158 Wash. Dec. 101]

[No. 34451. *En Banc.* April 20, 1961]

HOWARD L. NOSTRAND *et al.*, *Respondents*, *v.* HERBERT S. LITTLE *et al.*, *Appellants.*

This case was originally decided by this court January 29, 1959, and was then entitled *Nostrand v. Balmer*. Our decision is reported in 53 Wn.(2d) 460, 335 P.(2d) 10, to which reference is made for a preface to the present opinion.

Thereafter, the case was appealed to the Supreme Court of the United States and, after being argued and considered by that court, a *per curiam* opinion was filed May 2, 1960 (two justices dissenting), which is reported in 362 U. S. 474, 4 L. Ed.(2d) 892, 80 S. Ct. 840.

The mandate of the Supreme Court received June 13, 1960, directed that our judgment, entered March 20, 1959, be vacated and the cause remanded for further proceedings not inconsistent with the *per curiam* opinion.

Accordingly, this court, by order entered June 17, 1960, vacated its judgment of March 20, 1959, and set the cause for further hearing *en banc* at its September, 1960, session for a consideration of the following issues:

1. Whether the plaintiffs have raised, either in the trial court or in this court, the claim that they should be afforded such hearing to explain or defend their refusal to take the oath; and

2. If such claim is properly before this court, whether the pertinent statutes of the state of Washington do or do not afford them such a hearing; and

3. If said statutes do not afford them such a hearing, whether plaintiffs are thereby denied due process of law under the constitution of the United States or the constitution of the state of Washington.

For convenience, we shall in this opinion refer to the plaintiffs Nostrand and Savelle as "the professors," and to the defendant state officers as "the regents."

At this hearing which was held September 21, 1960, counsel for the parties submitted briefs and presented oral arguments bearing on these issues.

Before considering the issues above referred to, we wish to refer to the *per curiam* opinion of the Supreme Court, in which the reasons for remanding the case to this court are stated.

We think that it will be helpful to have in mind the circumstances under which this case has been remanded to this court and, therefore, we quote the *per curiam* opinion in full (omitting only the reference to *Seattle v. Ross*, 54 Wn.(2d) 655, 344 P.(2d) 216 (1959), referred to below):[1]

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[1]In our opinion, our recent decision in the case of *Seattle v. Ross, supra*, has no bearing on the issues involved in the present case. The reasons therefor are stated in the dissenting opinion of Mr. Justice Douglas (concurred in by Mr. Justice Black). Furthermore, the Seattle ordinance defined a criminal offense of which Ross was convicted. The instant case is a purely civil proceeding involving the right of a public employee to continue his employment without signing the affidavit required by the statute. The act before us prescribes no presumption

"Washington requires every public employee to subscribe to an oath that he is 'not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets, advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, [or of the State of Washington], or of any political subdivision of either of them, by revolution, force or violence; ° ° °.' Refusal so to do 'on any grounds shall be cause for immediate termination of such employee's employment.'

"Appellants brought this declaratory judgment action claiming the Act to be violative of due process as well as other provisions of the Federal Constitution. One of the claims *is* that no hearing is afforded at which the employee can explain or defend his refusal to take the oath. *The Supreme Court of Washington did not pass on this point.* The Attorney General suggests in his brief that prior to any decision thereon here, 'the Supreme Court of Washington should be first given an opportunity to consider and pass upon' it. . . . In the light of these circumstances we cannot say how the Supreme Court of Washington would construe this statute on the hearing point.

"The declaratory nature of the case, the fact that the State's statute here under attack supplements previous statutory provisions raising questions concerning the applicability of the latter, together with the comity that should be afforded the State with regard to the interpretation of its own laws, bring us to the conclusion that we must remand the case for further consideration. *Cf. Williams v. State of*

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than an employee who fails to take the oath is a subversive person. His refusal to answer the required question in affidavit form is ground for discharge from public employment either for incompetency or insubordination or doubtful trust and reliability.

Georgia, 1955, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161."[2] (Italics ours.)

We have italicized certain words in the foregoing quotation because they have been erroneously construed by some news commentators as implying that this court did not do its full duty in the premises, and that the remand was made necessary because we had negligently failed to decide all the questions before us on the first hearing. We do not so read the *per curiam* decision, but, since the public has been so advised, we wish to take this opportunity to record the fact that (as will more fully appear below) we decided in our original opinion every justiciable issue which was then before us for consideration.

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[2]We have examined the case of *Williams v. Georgia*, to which our attention has been called in the *per curiam* opinion of the Supreme Court. The majority opinion in that case remanded it to the state supreme court to reconsider the extraordinary motion for new trial of a defendant convicted of first degree murder. The final paragraph of the opinion stated the Supreme Court's reasons for remanding the case as follows:

"The facts of this case are extraordinary, particularly in view of the use of yellow and white tickets by a judge of the Fulton County Superior Court almost a year after the State's own Supreme Court had condemned the practice in the *Avery* case. That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant. We think that orderly procedure requires a remand to the State Supreme Court for reconsideration of the case. Fair regard for the principles which the Georgia courts have enforced in numerous cases and for the constitutional commands binding on all courts compels us to reject the assumption that the courts of Georgia would allow this man to go to his death as the result of a conviction secured from a jury which the State admits was unconstitutionally impaneled. *Cf. Mooney v. Holohan*, 294 U. S. 103."

On the remand, the supreme court of Georgia declined to reconsider the case. *Williams v. State*, 211 Ga. 763, 88 S.E.(2d) 376. The United States Supreme Court then denied a petition for certiorari to review that decision, 350 U. S. 950, 100 L. Ed. 828, 76 S. Ct. 326. A petition for rehearing was subsequently denied by the Supreme Court, 350 U. S. 977, 100 L. Ed. 847, 76 S. Ct. 443.

I.

In order to determine whether the constitutional question, which is the subject of the Supreme Court's opinion, was presented to us for decision at the original hearing in this court, it is necessary to review the record from the beginning.

The professors instituted this action under our declaratory judgment act (RCW 7.24.010 *et seq.*) by filing their complaint, in which they alleged that the action was brought

> "... for the purpose of testing and determining the constitutionality of the Act, and the right of the defendants (the regents) to establish, enforce, carry out, and administer the provisions thereof through the insistence that plaintiffs and other state employees execute the oath, or otherwise." (Paragraph 9 of the complaint.)

As to their status and rights as state employees to challenge the act, the professors alleged, in paragraphs 1 and 2, that:

> "They are residents of King County, Washington, and are presently employed under contract as professors by the University of Washington, hereinafter called the University, an institution of higher learning owned and operated by the State of Washington, through the defendant Board of Regents.
>
> "Through plaintiffs' employment contracts and pursuant to the terms of R.C.W. 28.76 and the rules and regulations of the University, plaintiffs have employment tenure and certain retirement benefits."

The allegations wherein they raised federal questions

are found in paragraphs 6 and 7, reading as follows:

> "Pursuant to the Act, defendants have demanded that plaintiffs sign and swear to an oath, a copy of which is attached hereto, marked Exhibit 'A'; and unless plaintiffs comply with such demands, their employment contracts with the University will be terminated by the defendants.
>
> "The terms, provisions, and requirements of the Act and the oath are in violation of plaintiffs' rights, privileges and immunities under the Constitution of the United States in the following particulars:
>
> "1. They violate the rights guaranteed under the First Amendment as made applicable to the States by the Fourteenth Amendment;
>
> "2. They violate the rights guaranteed under the Fifth Amendment as made applicable to the States by the Fourteenth Amendment;
>
> "3. They deprive the plaintiffs of their rights without due process of law and deny them the equal protection of the laws as guaranteed by the Fourteenth Amendment; and
>
> "4. They constitute a Bill of Attainder contrary to Article I, Section 10."

The regents, in their answer, denied all the allegations of the complaint above referred to.

After the trial of the cause, the trial court entered certain findings of fact and conclusions of law. The findings which are pertinent to our present inquiry are:

> "I. The plaintiffs are residents of King County, Washington, and are presently employed under contract as professors by the University of Washington, hereinafter called the University, an institution of

higher learning owned and operated by the State of Washington, through the defendant Board of Regents.

"II. Through the plaintiffs' employment contracts and pursuant to statute and the rules and regulations of the University, plaintiffs have certain tenure rights and certain retirements benefits.

". . .

"V. All defendants are charged with the duty of establishing, enforcing, carrying out and administering the provisions of Chapter 377, Laws of 1955, hereinafter called the Act, enacted by the Legislature of the State of Washington on March 9, 1955, approved by the Governor on March 21, 1955. The Act provides that each department head in the State of Washington must require that each employee under his charge state under oath whether or not he is a member of the Communist Party or other subversive organization, or upon failure to execute such oath, his employment be terminated.

"VI. Pursuant to the Act, defendants have demanded that plaintiffs sign and swear to an oath, a copy of which is attached to the complaint herein, marked Exhibit A, and have stated that unless the plaintiffs complied with such demands, their employment contracts with the University would be terminated by the defendants."

The trial court, in its conclusions of law, held that the act was invalid because it violated certain provisions of the constitution of the state of Washington, and declared that the professors were entitled to the declaratory relief and the injunction prayed for. No federal question was decided by the trial court.

The final decree granted the following declaratory relief:

> "IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Chapter 377, Laws of 1955 violates the Constitution of the State of Washington, and is therefore void and of no effect; . . ."

The decree also permanently enjoined the regents from enforcing the act and from requiring the professors to execute any oath pursuant thereto.

From this final decree the regents appealed to this court, and, after our consideration of the briefs and oral arguments, we rendered the unanimous decision of January 29, 1959, referred to above.

In this posture of the case, we turn to a consideration of the first of the three questions set forth above, to wit, whether the professors raised the "hearing" issue either in the trial court or in this court.

We can find nothing in the complaint or elsewhere in the record in the trial court indicating that this issue was ever called to the court's attention. The portions of the record which we have just quoted make it plain that the issue was not raised or considered. The trial court's decree granting declaratory relief to the professors is specifically limited to the basis that the act violated certain provisions of the state constitution. Neither the decree nor the conclusions of law on which it was based mention any federal question whatsoever. The only reference to the United States constitution anywhere in the trial court record is found in the allegations of paragraph 7 of the complaint, quoted above. These allegations raised four points, wherein it was claimed that their rights, privileges and immunities under the United States constitution were

impaired by the act and the oath. However, these were general in scope and nothing was said about the lack of a hearing being one of them.

Parenthetically, there is neither allegation nor finding that the professors have ever refused to take the oath or that they intend to do so in the future. In the absence of such a showing it would seem premature, even in a declaratory judgment action, for a court to rule on a hypothetical situation. At least until the professors show that they have refused to sign the oath, or intend to do so, they are not entitled to demand an administrative hearing on any ground.

II.

Assuming that when the case first came to this court the professors were in a position to raise the hearing issue, the question remains: What did they do to alert this court at that time as to their contention (now made in the Supreme Court) that the act was violative of the United States constitution upon the ground that no hearing was afforded at which the employee could explain or defend his refusal to take the oath.

In their brief on the last hearing before this court, counsel for the professors frankly stated:

> "As to presentation of this basis of unconstitutionality in the appeal to this Court, we acknowledge that in respondents' brief we did not present this with the precision and definiteness that in retrospect we would have liked. But this matter was sufficiently presented in our brief to alert the Court to the prob-

lem of procedural due process as applied to the Act. In our brief we cited and discussed *Adler v. Board of Education*, 342 U. S. 485, 96 L. ed. 517, 72 S. Ct. 380, 27 ALR (2d) 472 (1952) (Resp. Br. 23, 24, 27-28, 31, 35, 36, 48, 53, 55); *Slochower v. Board of Education*, 350 U. S. 551, 76 S. Ct. 637, 100 L. ed. 692 (1955) (Resp. Br. 35-36), and *Rudder v. United States*, (C.A. D.C. 1955) 226 F.(2d) 51 (Resp. Br. 21-23)..."

It seems to us that, in a case which involved many constitutional issues, both state and federal, the citation of these three cases in connection with *other* points cannot reasonably be held to be adequate notice that the hearing issue was being relied upon.

In this connection, the professors further assert that, because at that time the validity of another section of the act was also challenged (Section 3, relating to the United States Attorney General's list of subversive organizations), we should have, *sua sponte*, applied to section 4 of the act the rule adopted by the Supreme Court in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U. S. 123, 95 L. Ed. 817, 71 S. Ct. 624, relating to the indispensability of hearings.

We do not think that we were called upon, after having held that section 3 was invalid, to search the record for other possible applications of the *McGrath* case to situations not called to our attention by counsel. It is the duty of counsel to be specific in presenting their contentions to an appellate court. In the present case, this was not done with regard to the hearing issue until after we had decided the case.

The professors then filed a petition for hearing in which, for the first time (as far as we were aware), they raised the question of the invalidity of section 4 of the act on the ground that there was no provision for a hearing at which an employee could explain or defend his refusal to sign the oath (if he had refused to do so).

This court has for many years adhered to its rule that it will not consider questions presented to it for the first time in a petition for rehearing. *State v. Hazzard*, 76 Wash. 586, 137 Pac. 143 (1913), and cases cited therein.

Were it not for the fact that this case has been remanded to this court by the Supreme Court with the request that we interpret the act with respect to the hearing issue, we would dismiss the professors' claim as not being timely raised. That would, of course, terminate our consideration of the case.

III.

Nevertheless, as a matter of comity, we desire to comply with the Supreme Court's request that we consider the claim that the act does not provide for a hearing at which the employee can explain or defend his refusal to take the oath. We, of course, limit our consideration of the problem to the facts before us. Even in a declaratory judgment action, there must be a justiciable controversy. *Washington Beauty College v. Huse*, 195 Wash. 160, 80 P.(2d) 403 (1938).

The Supreme Court has also held that the requirements

for a justiciable case or controversy are no less strict in a declaratory judgment proceeding than in any other type of litigation.

Alabama State Federation of Labor v. McAdory, 325 U. S. 450, 89 L. Ed. 1725, 65 S. Ct. 1384.

Congress of Industrial Organizations v. McAdory, 325 U. S. 472, 89 L. Ed. 1741, 65 S. Ct. 1395.

In these two cases the Supreme Court had granted writs of certiorari to review the decisions of the Supreme Court of Alabama in declaratory judgment proceedings instituted to obtain adjudications as to the constitutionality of the Bradford Act (which regulated the conduct of labor unions "functioning" within the state).

The state supreme court had upheld the validity of certain portions of the act (and had held other portions unconstitutional). On reviewing the record in each case, the Supreme Court dismissed the writ of certiorari because there was no concrete set of facts presented to the court to indicate which statutory provisions were to be applied. In dismissing the writ of certiorari in the case first cited above, the Supreme Court said, in a unanimous opinion by Chief Justice Stone:

> "... In advance of an authoritative construction of a state statute, which the state court alone can make, this Court cannot know whether the state court, when called on to apply the statute to a defined case or controversy, may not construe the statute so as to avoid the constitutional question. For us to decide the constitutional question by anticipating such an authoritative construction of the state

statute would be either to decide the question unnecessarily or rest our decision on the unstable foundation of our own construction of the state statute which the state court would not be bound to follow. *Spector Motor Co. v. McLaughlin, supra*, 105; see also *Vandenbark v. Owens-Illinois Co.*, 311 U. S. 538, 543; *Huddleston v. Dwyer*, 322 U. S. 232. Such is not the function of the declaratory judgment.

"The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court. See *Great Lakes Co. v. Huffman, supra*. It would be an abuse of discretion for this Court to make a pronouncement on the constitutionality of a state statute before it plainly appeared that the necessity for it had arisen, or when the Court is left in uncertainty, which it cannot authoritatively resolve, as to the meaning of the statute when applied to any particular state of facts. In any event the parties are free to litigate in the state courts the validity of the statute when actually applied to any definite state of facts, with the right of appellate review in this Court. In the exercise of this Court's discretionary power to grant or withhold the declaratory judgment remedy it is of controlling significance that it is in the public interest to avoid the needless determination of constitutional questions and the needless obstruction to the domestic policy of the states by forestalling state action in construing and applying its own statutes. See *Great Lakes Co. v. Huffman, supra*, 300, *et seq.*"

The reasoning of the Supreme Court in its opinion dismissing the writ in the second case above cited is seemingly applicable by analogy to the situation presented in the case at bar. The court said:

"Further the contention that § 16 conflicts with

the National Labor Relations Act, cf. *Hill v. Florida, post*, p. 538, was not passed on by the Circuit Court, was not raised by assignment of error in the Alabama Supreme Court, and that court did not pass on that question either in its opinion in this case or in its opinion in the *Alabama State Federation of Labor* case which it adopted as controlling. The Alabama Supreme Court will not consider errors which have not been assigned, *Rowland & Co. v. Plummer*, 50 Ala. 182, 197, *Pettibone-Taylor Co. v. Farmers Bank*, 156 Ala. 666, 46 So. 751; *Malaney v. Ladura Mines Co.*, 191 Ala. 655, 65 So. 666; *Nichols v. Hardegree*, 202 Ala. 132, 79 S. 598; *Halle v. Brooks*, 209 Ala. 486, 96 So. 341, or which have not been specifically and precisely raised in the assignments of error, *Kinnon v. Louisville & Nashville R. Co.*, 187 Ala. 480, 65 So. 397; *Carney v. Kiser Co.*, 200 Ala. 527, 76 So. 853; *Hall v. Pearce*, 209 Ala. 397, 399, 96 So. 608; *Jackson Lumber Co. v. Butler*, 244 Ala. 348, 13 So. 2d 294, 298. Since the State Supreme Court did not pass on the question now urged, and since it does not appear to have been properly presented to that court for decision, we are without jurisdiction to consider it in the first instance here. *Caperton v. Bowyer*, 14 Wall. 216, 236; *Hulbert v. Chicago*, 202 U. S. 275, 280, 281; *Dorrance v. Pennsylvania*, 287 U. S. 660; *Chandler v. Manifold*, 290 U. S. 665; see also *Flournoy v. Wiener*, 321 U. S. 253; *Charleston Assn. v. Alderson*, 324 U. S. 182, 185, and cases cited."

The material facts shown by the record in the present case as to this hearing issue are that these two professors (who have never refused to take the oath) are presently employed under contract as full professors by the University of Washington, which is operated by the regents. Through their employment contracts, and pursuant to

statute and the rules and regulations of the university, they have certain tenure rights.[3] The regents have demanded that the professors sign and swear to an oath (a copy of which is attached to their complaint), and have further stated that, unless the professors complied with such demand, their employment contracts with the university will be terminated by the regents.

This court has very recently held, in *Yantsin v. Aberdeen*, 54 Wn.(2d) 787, 345 P.(2d) 178 (1959), that, in the absence of civil service or other tenure rights, public employees may be discharged by their employers without any reason being assigned therefor. There is no vested right to public employment in the state of Washington unless the employee has some tenure rights provided by law. Since the power to discharge is absolute except for such tenure rights, the discharged public employee is not entitled to a hearing regarding the reason for his discharge.

As pointed out in our original decision, the definition of subversive person in the 1951 act was amended in 1953 to provide that a person must have knowledge that an organization is a subversive organization before he can be deemed to be a subversive person. Hence, the element of *scienter* is essential to prove perjury in taking the oath. This interpretation of the act and the oath is now the law of the case. Therefore, the decision in *Wieman v. Updegraff*, 344 U. S. 183, 97 L. ed. 216, 73 S. Ct. 215, has no application.

[3]For applicable rules and regulations regarding tenure rights, see appendix to this opinion. These are discussed later in this opinion.

It should be further noted that, under the Washington act, there is no inquiry as to past acts or past associations of the employee. The affidavit speaks in the present tense only as of the date the employee takes the oath. If he is now a member of the Communist party or other subversive organization, he may resign today and execute the affidavit tomorrow without incurring any penalty or risking a charge of perjury. Apparently, the New Jersey educational oath statute likewise applies only to the present status of the teacher.[4]

[4]The supreme court of New Jersey recently rendered a unanimous decision in the case of *Lowenstein v. Newark Board of Education*, 33 N. J. 277, 163 A.(2d) 156, which concerned one of the same teachers whose dismissal was set aside in *Laba v. Newark Board of Education*, 23 N. J. 364, 129 A.(2d) 273. (We cited the *Laba* case in our original opinion as holding that New Jersey took judicial notice that the Communist party was part of a world-conspiracy whose prime objective was the overthrow of the United States government.)

In the *Lowenstein* case, Justice Hall, speaking for the court, referred to the New Jersey educational oath statute as requiring present, not past, allegiance. On this point, the policies of Washington and New Jersey appear to be the same. The opinion stated, in part, as follows:

"Here the inquiry was to aid in determining whether there was sufficient basis to charge that appellant was unfit to teach because subject to the ideologies and disciplines of Communism. Subjection connotes such belief in the overthrow of our government by force or other unlawful means and in the substitution of a totalitarian state with destruction of all of our heritage of individual freedoms as to be subservient to commands to act in any way directed to carry out these nefarious purposes. It is essentially a state of mind, admittedly difficult to determine extrinsically but generally evidenced sufficiently by knowing membership and participation in true Communist organizations and activities designed to further the basic aim of such violent overthrow of our government.

"The focal point of the inquiry in the instant case was such subjection now rather than in the past. It is not suggested by the Board that any past conduct of appellant would be of a nature that in itself would justify dismissal even if there were no present subjection, so we are not called upon to determine under what circumstances, if any, the right to discipline would exist in such a situation and what we are about to say further is directed particularly to the precise situation before us. In fact, the Board's brief specifically says that the 'fitness inquiry . . . involved not only the question of *present* party

Instead of being called in by his superior and being asked orally if he belongs to a subversive organization, the legislature has adopted the policy of asking each public employee to state in writing, *i.e.* by affidavit, whether he is at that time a member of such an organization. If he signs the affidavit, that is the end of the matter. If he declines to sign, the employee is subject to immediate discharge. If he has no tenure rights, he has no vested right to public employment, and the act affords him due process. *Nelson v. County of Los Angeles*, 362 U. S. 1, 4 L. Ed. (2d) 494, 80 S. Ct. 527. On the other hand, if he has

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membership but also the question of *present* subservience to the Party's 'ideologies and disciplines' (emphasis supplied) and at oral argument the board's counsel expressly agreed with the proposition that no right to dismiss exists merely because a teacher was a member of the Communist Party in the past when it is clear that he is not presently. *Such a view follows state policy as expressed in the educational oath statute* (N.J.S.A. 18:13-9.1 and 9.2) *where the criterion is present allegiance. . . .*" (Last italics ours.)

It should also be noted that the court in that case approved its 1951 decision in *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498, 79 A.(2d) 462 (which we cited in our original decision), stating as follows:

". . . Passing over the matter of any effect to be given to the fact that the refusal did not extend to all prior event questions, it seems clear that mere alleged invasion of privacy and personal dignity can constitute no bar to an inquiry of this type, if the questions posed are otherwise proper and appropriate. The subject is much too vital today to depend upon such personal views, however sincerely held. The matter is not simply one of academic freedom of thought and expression. As was so well said by Justice Heher in *Thorp v. Board of Trustees of Schools for Industrial Education*, 6 N. J. 498 (1951): 'The maintenance of the purity of the educational process against corruption by subversive influences is of the highest concern to society. . . . Loyalty to government and its free democratic institutions is a first requisite for the exercise of the teaching function. Freedom from belief in force or violence as a justifiable weapon for the destruction of government is of the very essence of a teacher's qualifications' (at p. 513). See also *Adler v. Board of Education*, 342 U. S. 485, 493, 96 L. Ed. 517, 524, 72 S. Ct. 380 (1951). Any concept of individual privilege against intrusion on privacy and conscience must give way in these times and these situations to the greater public interest."

tenure rights, he must be accorded such a hearing as his contract of employment calls for.

The *Nelson* case involved the dismissal of two county employees because of their refusal to answer questions put to them by a congressional subcommittee concerning subversion. They both had been previously ordered by the county board of supervisors to answer such questions. The California district court of appeal had upheld the discharges and the United States Supreme Court granted certiorari. It should be noted that one employee (Nelson) had a civil service status, and had been given a hearing before the civil service commission; the other (Globe) was a temporary employee and was not entitled to a hearing under the civil service rules.

The decision of the Supreme Court affirmed the discharge of Nelson by an equally divided court. Hence, his case was not discussed in the opinion. As to Globe's discharge, the majority upheld his dismissal for insubordination, three justices dissenting.

Since the majority opinion appears to have a pertinent bearing on the problem presented for decision in this case (especially because of the professors' reliance on the *Slochower* case discussed therein), we quote the following portion of that opinion:

> "We, therefore, reach Globe's contention that his summary discharge was nevertheless arbitrary and unreasonable. In this regard he places his reliance on *Slochower v. Board of Education*, 350 U. S. 551 (1956). However, the New York statute under which Slochower was discharged specifically operated 'to

discharge every city employee who invokes the Fifth Amendment. In practical effect the questions asked are taken as confessed and made the basis of the discharge.' *Id.*, at 558. This 'built-in' inference of guilt, derived solely from a Fifth Amendment claim, we held to be arbitrary and unreasonable. But the test here, rather than being the invocation of any constitutional privilege, is the failure of the employee to answer. California has not predicated discharge on any 'built-in' inference of guilt in its statute, but solely on employee insubordination for failure to give information which we have held that the State has a legitimate interest in securing. See *Garner v. Board of Public Works of Los Angeles*, 341 U. S. 716 (1951); *Adler v. Board of Education*, 342 U. S. 485 (1952). Moreover it must be remembered that here—unlike *Slochower*—the Board had specifically ordered its employees to appear and answer.

"We conclude that the case is controlled by *Beilan v. Board of Education of Philadelphia*, 357 U. S. 399 (1958), and *Lerner v. Casey*, 357 U. S. 468 (1958). It is not determinative that the interrogation here was by a federal body rather than a state one, as it was in those cases. Globe had been ordered by his employer as well as by California's law to appear and answer questions before the federal subcommittee. These mandates made no reference to Fifth Amendment privileges. If Globe had simply refused, without more, to answer the Subcommittee's questions, we think that under the principles of *Beilan* and *Lerner* California could certainly have discharged him. The fact that he chose to place his refusal on a Fifth Amendment claim puts the matter in no different posture, for as in *Lerner, supra*, at 477, California did not employ that claim as the basis for drawing an inference of guilt. Nor do we think that this discharge is vitiated by any deterrent effect that California's law might have had on Globe's

exercise of his federal claim of privilege. The State may nevertheless legitimately predicate discharge on refusal to give information touching on the field of security. See *Garner* and *Adler, supra.* Likewise, we cannot say as a matter of due process that the State's choice of securing such information by means of testimony before a federal body can be denied. Finally, we do not believe that California's grounds for discharge constituted an arbitrary classification. See *Lerner, id.*, at 478. We conclude that the order of the County Board was not invalid under the Due Process Clause of the Fourteenth Amendment."

The Supreme Court also declined to pass upon Globe's contention as to the privileges and immunities clause of the fourteenth amendment, "since it was neither raised in nor considered by the California courts." It seems to us that the quoted phrase is applicable to the professors' contentions regarding the hearing issue in the case at bar.

Before discussing the professors' tenure rights, we desire to refer to two companion cases decided by the Supreme Court on December 12, 1960. They both involved the validity of an Arkansas statute requiring all public school teachers and professors in institutions of higher learning supported by public funds, as a condition precedent to their employment, to file an affidavit "as to the names and addresses of all incorporated or unincorporated associations and organizations" to which they are presently paying dues or are making contributions, or to which they have paid dues or have made contributions "within the past five years."

One of these cases, *Shelton v. Tucker,* —— U. S. ——, 5 L. Ed. (2d) ——, 81 S. Ct. 247, was appealed from the

decision of a three-judge United States district court, 174 Fed. Supp. 351. The other case, *Carr v. Young*, ——— Ark. ———, 331 S.W.(2d) 701, was an appeal from the decision of the supreme court of Arkansas. The two lower courts upheld the statute and the Supreme Court reversed the decision in each case, four justices dissenting.

The majority opinion held that the Arkansas statute was invalid because it was too broad.

> "The question to be decided here is not whether the State of Arkansas can ask certain of its teachers about all their organizational relationships. It is not whether the State can ask all of its teachers about certain of their associational ties. It is not whether teachers can be asked how many organizations they belong to, or how much time they spend in organizational activity. The question is whether the State can ask every one of its teachers to disclose every single organization with which he has been associated over a five-year period. The scope of the inquiry required by Act 10 is completely unlimited. The statute requires a teacher to reveal the church to which he belongs, or to which he has given financial support. It requires him to disclose his political party, and every political organization to which he may have contributed over a five-year period. It requires him to list, without number, every conceivable kind of associational tie—social, professional, political, avocational, or religious. Many such relationships could have no possible bearing upon the teacher's occupational competence or fitness.
>
> ". . .
>
> "The unlimited and indiscriminate sweep of the statute now before us brings it within the ban of our prior cases. The statute's comprehensive interference with associational freedom goes far beyond what

might be justified in the exercise of the State's legitimate inquiry into the fitness and competence of its teachers. The judgments in both cases must be reversed."

Two separate opinions were written, in both of which all four dissenting justices joined. Mr. Justice Harlan stated in his dissent:

". . . Where official action is claimed to invade these rights [free speech and association], the controlling inquiry is whether such action is justifiable on the basis of a superior governmental interest to which such individual rights must yield. When the action complained of pertains to the realm of investigation, our inquiry has a double aspect: first, whether the investigation relates to a legitimate governmental purpose; second, whether, judged in the light of that purpose, the questioned action has substantial relevance thereto. See *Barenblatt v. United States*, 360 U. S. 109; *Uphaus v. Wyman*, 360 U. S. 72.

"In the two cases at hand, I think both factors are satisfied. It is surely indisputable that a State has the right to choose its teachers on the basis of fitness. And I think it equally clear, as the Court appears to recognize, that information about a teacher's associations may be useful to school authorities in determining the moral, professional, and social qualifications of the teacher, as well as in determining the type of service for which he will be best suited in the educational system. See *Adler v. Board of Education*, 342 U. S. 485; *Beilan v. Board of Higher Education*, 357 U. S. 399; see also *Slochower v. Board of Education*, 350 U. S. 551. Furthermore, I take the Court to acknowledge that, agreeably to our previous decisions, the State may enquire into associations to the extent that the resulting information may be in aid of that legitimate purpose. These cases therefore

do not present a situation such as we had in *N.A.A.C.P. v. Alabama*, 357 U. S. 449, and *Bates v. Little Rock*, 361 U. S. 516, where the required disclosure bears no substantial relevance to a legitimate state interest.

"Despite these considerations this statute is stricken down because, in the Court's view, it is too broad, because it asks more than may be necessary to effectuate the State's legitimate interest. Such a statute, it is said, cannot justify the inhibition on freedom of association which so blanket an inquiry may entail. *Cf. N.A.A.C.P. v. Alabama, supra; Bates v. Little Rock, supra.*"

We note parenthetically that the Arkansas statute does not provide for a hearing at which the teacher or the professor may explain or defend his refusal to file the required affidavit, nor is there any reference in any of the opinions as to any constitutional necessity therefor.

The Washington statute involved here is tailored to the legislative determination as to what is necessary in the premises to protect the state and its educational institutions from activities of subversive persons who are being financially maintained by the state and its municipalities. Unlike the Arkansas statute, our act is not too broad in its scope.

The Supreme Court, in remanding this case, has in effect asked us to construe the subversive activities act of 1951 (as amended in 1953 and in 1955) with reference to the hearing issue.

Since the professors in the present case (as the trial court found) are employed by the regents under contract

as full professors and have certain tenure rights, we must construe the subversive activities act in the light of the tenure rights which they possess under the rules and regulations adopted by the regents. The pertinent portions of these rules and regulations are set forth in the appendix to this opinion.

Briefly stated, the tenure rights of a professor include the right to be given written notice of the alleged grounds for his discharge from his position, a "trial" before a standing committee composed of eleven members of the faculty known as the tenure committee, the right to be represented by any person of his choice, the right to be present during the taking of testimony, to call witnesses, and to cross-examine opposing witnesses. The procedure prescribed in the rules and regulations for the conducting of the hearing is substantially the same as an accused person ordinarily would receive in a court of law, except a jury trial.

The committee, at the conclusion of the hearing, makes written findings and recommendations, which, together with a transcript of the testimony, are filed with the president of the university (who also attends the hearing but not the deliberations of the committee).

A professor may be removed from his position only "for cause," which is defined as one or more of the following reasons: (1) Incompetence, (2) neglect of duty, (3) physical or mental incapacity, (4) dishonesty or immorality, (5) conviction of a felony.

The president, after reviewing the findings and recom-

mendations of the tenure committee, makes his decision as to whether or not a cause for removal has been established in a particular case and reports to the regents.

We are of the opinion that the provision in the subversive activities act to the effect that refusal to take the oath "on any grounds" shall be cause for "immediate termination of employment," should not be interpreted in the case before us as meaning that a full professor having tenure rights under his contract of employment is deprived of the right to a hearing as provided in the rules and regulations of the university. In other words, if the professors should refuse to sign the affidavit (which they have not yet refused to do), they, in our opinion, will be entitled to the hearing before the tenure committee and to the other procedures relating to termination of employment prescribed in the university's rules and regulations, set forth in the appendix to this opinion.

Counsel for both parties, in their respective briefs (filed subsequent to the last argument in this court), referred to the hearing provided for in § 15 of the 1951 act (RCW 9.81.090). In our opinion, this hearing provision does not apply to persons refusing to sign the oath, because, under Laws of 1957, chapter 377, § 1 (which amends § 12 of the 1951 act), refusal by a public employee or applicant for public employment to sign the oath on any grounds shall be cause for immediate termination of such employment or refusal to accept an application therefor.

Declining to take the oath does not stamp a public employee as a subversive person. There is no stain of dis-

loyalty attached thereto. If he does not wish to sign the oath, he may seek private employment. On the other hand, if he takes the oath and subsequently his superior has bona fide grounds for investigating his qualifications (including a charge that he is a subversive person), then such employee is entitled to a hearing as provided in § 15 of the 1951 act. Such a hearing was afforded in the *Beilan, Lerner, Nelson* and *Lowenstein* cases, *supra.*

We conclude that the professors are not entitled to a hearing under § 15 of the 1951 act, but, as stated above, are entitled to a hearing before the tenure committee, because the rules and regulations adopted by the regents (which form a part of their contracts of employment) so provide.

The regents have urged, in their reply brief, that the professors are entitled to a hearing under the model state administrative code (Laws of 1959, chapter 234, RCW 34.04.010 *et seq.*), citing *Wong Yang Sung v. McGrath,* 339 U.S. 33, 94 L. Ed. 616, 70 S. Ct. 445. However, we are of the opinion that this 1959 statute was not intended to supersede established procedure adopted by the regents pursuant to RCW 28.77.120 and 28.77.130. There is nothing in the administrative code which indicates to us a legislative intent to amend or repeal the statutes relating to the operation of the University of Washington which have been in effect for fifty years.

Pursuant to the mandate of the Supreme Court received by this court June 13, 1960, we construe the 1951 subversive activities act of this state (as amended), with

reference to the question of whether it affords a hearing to the professors in this case at which they may explain or defend their refusal to take the oath required by the act, as follows:

Assuming (a) that the professors timely raised this hearing issue in the Washington courts, and (b) that they have refused to take the oath or have proved that they will refuse to do so, we are of the opinion that, before they can be discharged for such refusal, the professors, under their contract of employment, are entitled to a hearing before the tenure committee conducted in the manner prescribed in the applicable rules and regulations adopted by the regents (see appendix) for the termination of the tenure of full professors employed by the University of Washington.

As to all other issues involved in this case, we adhere to the views expressed in our original opinion of January 29, 1959, and reported in 53 Wn.(2d) 460, 335 P.(2d) 10.[5][6]

Pursuant to the mandate of the Supreme Court, we direct that the clerk of this court forthwith transmit to that court a certified copy of this opinion.

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[5]Other decisions of the Supreme Court which have been rendered since our original decision of January 29, 1959, and have a bearing on the questions decided therein are: *Barenblatt v. United States*, 360 U. S. 109, 3 L. Ed.(2d) 1115, 79 S. Ct. 1081; *Uphaus v. Wyman*, 360 U. S. 72, 3 L. Ed.(2d) 1090, 79 S. Ct. 1040; *Uphaus v. Wyman*, U. S. , 5 L. Ed.(2d) , 81 S. Ct. 153; *Wilkinson v. United States*, U. S. , L. Ed. , 81 S. Ct. 567; *Braden v. United States*, U. S. , L. Ed. , 81 S. Ct. 584.

[6]The dissenting opinion (see below), as we read it, implies that the rights of all state employees, in addition to those of the two profes-

DONWORTH, J

WE CONCUR:

ROSELLINI, J.

HILL, J. OTT, J.

WEAVER, J. FOSTER, J.

HUNTER, J.

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sors who instituted this action, should be considered in this opinion. Those questions are not before us. In the first place, the professors alleged, and the trial court found, that they had employment contracts and that, under the rules and regulations of the university, they had tenure rights. Secondly, the mandate of the Supreme Court directed us to pass on the professors' claim "that no hearing is afforded at which the employee can explain or defend his refusal to take the oath." Thirdly, neither the briefs nor the arguments of counsel in either of the two hearings before this court have made any reference to the rights of any of the thousands of public employees (state, county, and municipal) whose rights are governed in each particular category by the provisions of other statutes or city charters which have not even been mentioned in this litigation.

We have answered the only question involved in this case which has been referred to us for answer by the Supreme Court.

The dissent refers also to the proscribed organizations named by the United States attorney general. These organizations have not been involved in this case since our original opinion (*Vostrand v. Balmer*, 53 Wn.(2d) 460, 471) was filed over two years ago. We there held, in a *unanimous opinion*, that section 3 of the act (which attempted to adopt as proscribed subversive organizations those named by the attorney general) was unconstitutional for three reasons. No appeal was taken from that part of our judgment, so under the law of the case the attorney general's list of proscribed organizations cannot be considered again.

Appendix

Excerpts from Chapter 25, Part II of the Faculty Handbook

University of Washington (1956)

Tenure of the Faculty

"Section 2501. Statute Relating to Tenure

" '[The Board of Regents] shall have full control of the university . . . and shall employ the president, members of the faculty, assistants and employees of the institution, who shall hold their positions during the pleasure of said Board of Regents.' [See RCW 28.77.130(1)].

"Reference: see Section 1102.

"Section 2511. Statement of Policy by the Board of Regents

"The University of Washington Regents accept in principle the concept that tenure for members of the faculty is essential for effective teaching and sustained productivity in scholarship.

"They furthermore accept in principle the concept that the privilege of a faculty member to hold his position without discriminatory reduction in salary, and not to be removed therefrom, should not be abrogated except for cause and through orderly administrative processes, maintaining and retaining, however, the responsibilities and obligations of the Board of Regents as defined in the laws of the state of Washington.

"*Resolution of the Board of Regents, October 16, 1954.*

as amended May 19, 1956.

"Section 2531. Definition of Tenure

"Tenure is the right of a faculty member to hold his position without discriminatory reduction of salary, and not to suffer loss of such position, or discriminatory reduction of salary, except for the reasons and in the manner provided in this Chapter.

"Section 2532. Criteria for Tenure

"A. Unless he is disqualified under any other provision of this section, a full-time member of the faculty has tenure if—

"1. he is a professor or associate professor. . . .

"Section 2541. Granting of Tenure: Policy and Procedure

"A. Tenure should be granted to faculty members of such character and scholarly ability that the University, so far as its resources permit, can justifiably undertake to employ them for the rest of their academic careers. Such a policy requires that the granting of tenure be considered carefully. It should be a specific act, even more significant than promotion in academic rank, which is exercised only after careful consideration of the candidate's scholarly qualifications and character. . . .

"Section 2551. Grounds for Removal of Persons with Tenure

"A. Faculty members having tenure under the provisions of this Chapter may be removed from their posi-

tions or subjected to discriminatory reduction of salary for one or more of the following reasons:

"1. Incompetence

"2. Neglect of duty

"3. Physical or mental incapacity

"4. Dishonesty or immorality

"5. Conviction of a felony

Such a removal is termed 'a removal for cause.'

"B. Upon reorganization within the University of budgetary reasons or for reasons of educational policy, faculty members having tenure under the provisions of this Chapter may be removed from their positions, provided

"1. that the reorganization, in its relation to principles of tenure, is a reasonable procedure under the circumstances calling for it, and

"2. that every reasonable possibility of placing such persons in other University employment with tenure has been exhausted.

Such a removal is termed a 'removal for reorganization.' In proceedings to affect a removal for reorganization, the rules of procedure prescribed in Section 2562 shall be followed, but the Tenure Committee shall not consider the merits of the reorganization as budgetary or educational policy beyond determining its reasonableness in relation to principles of tenure.

"Section 2552. Necessity for Hearing in Tenure Proceedings

"No faculty member having tenure as defined in this Chapter shall be removed from his position or subjected to discriminatory reduction of salary until he has been given opportunity for a hearing as prescribed by Section 2562.

"Section 2561. The Tenure Committee

"There shall be a standing committee of the faculty known as the Tenure Committee which shall be composed of eleven faculty members appointed by the Senate. All members of this committee shall be persons having ten ure as defined in this Chapter.

"Section 2562. Procedure of the Tenure Committee

"A. To institute proceedings before the Tenure Committee under the requirement of Section 2552, the dean of the college or school in which the faculty member in question is employed shall sign and present a written statement to the chairman of the Tenure Committee. This written statement shall set forth all grounds for the proposed removal of the faculty member from his position or the proposed discriminatory reduction of his salary. If no such action is taken by his dean, a faculty member subject to removal from his position or to discriminatory reduction of salary may institute proceedings before the Committee by a written statement, signed and presented in the same manner, which shall set forth his grounds for opposing the action taken or impending against him.

"B. Upon receipt of such a written statement from the dean, the chairman of the committee shall cause a copy

of it to be delivered or mailed to the faculty member affected by the proposed action. Upon receipt of such a written statement from a faculty member, the chairman shall cause a copy of it to be delivered or mailed to the dean of the faculty member's college or school.

"C. Within twenty days after delivery or mailing of a copy of the written statement, the person to whom it has been delivered or mailed shall present to the chairman of the committee a written answer containing such admissions, denials, or other relevant statements as he deems appropriate. Upon receipt of this written answer, the chairman of the committee shall cause a copy of it to be mailed or delivered to the signer of the written statement.

"D. Upon receipt of the written answer or upon default thereof, the committee shall fix a date for hearing and advise the signer of the written statement and the person to whom the copy thereof was served of the time and place at which the matter will be heard by the committee.

"E. Hearings of the Tenure Committee are governed by the rules prescribed below.

"1. No member of the committee shall sit in a case which involves a member of his department or of his college or school if it is not departmentalized. If a committee member is so disqualified, the Senate upon recommendation of the Committee on Committees shall appoint a faculty member having tenure to act in place of the disqualified member.

"2. Since judgment must be passed by the President, it

is desirable that the President, who is *ex officio* a member of all committees, sit with the committee as an auditor, but, because he must judge the findings and recommendations, he shall not be present at the final deliberations.

"3. At the hearing a majority of the committee constitutes a quorum.

"4. Each party to the hearing is entitled to representation by any person of his choice. Each party shall be confronted by the witnesses, shall have the privilege of being present at all committee sessions when testimony is being heard, and shall have the right to call witnesses, produce relevant documents, and cross-examine opposing witnesses.

"5. If the hearing involves any charge of professional incompetence on the part of a faculty member, testimony of scholars in his field, whether within or without the University, shall be considered if offered.

"6. A full stenographic record of the hearing shall be made and shall be available to all parties concerned.

"7. At the conclusion of the hearing, the committee shall promptly make written findings and recommendations, the original of which, together with the transcript of testimony at the hearing, shall be filed with the President. Copies of the findings and recommendations shall be sent to each party to the hearing.

"8. The hearing shall be conducted according to such supplementary rules as the committee may establish. The committee shall be guided, but not necessarily bound, by the rules of evidence observed in courts of law."

No. 34451

FINLEY, C. J. (concurring specially)—The United States

Supreme Court has remanded this case to us to answer one and only one question. No plethora of rhetoric or logic can change this fact. The Court merely wants to know whether the state act (Laws of 1955, chapter 337 (RCW 9.81.070)), as construed or evaluated by our state supreme court, gives to Professors Nostrand and Savelle a right to a hearing before termination of employment if they refuse to execute the oath prescribed by the act.

The opinion written for the majority by Donworth, J., states unequivocally that the state subversive activities act, *supra,* does not in and of itself provide a right to a hearing. However, the majority opinion states with equal vigor that, in any event, the professors, as individual employees of the University, would be entitled to a hearing before the tenure committee under the tenure provisions of their employment contract and regulations of the University of Washington pertaining thereto.

I agree with the majority on both scores.

FINLEY, C. J.

No. 34451

MALLERY, J. (dissenting)—The Supreme Court of the United States vacated the judgment and remanded the cause to this court in order to ascertain whether or not the act by our interpretation affords a hearing to an employee in which he can explain or defend his refusal to take the oath.

Accordingly, the purpose of the instant opinion of this court is to decide whether or not the act contemplates

such a hearing and to inform the United States Supreme Court of our decision.

Implicit in the remand is the implication that, if we hold that such a hearing is not afforded by the act, it is "violative of due process."

The act requires every public employee to answer, under penalty of perjury, whether or not he is a subversive person by reason of being a member of the Communist party or any of the organizations designated as subversive by the attorney general of the United States pursuant to executive order No. 9835. The penalty for refusing to take the oath is immediate discharge.

The act contains no language that can be interpreted as providing for a hearing of any kind. Notwithstanding this, the majority opinion has met the issue posed by the United States Supreme Court remand by holding the act does afford the kind of a hearing contemplated by the United States Supreme Court. To reach this conclusion, the majority opinion assumes that the hearing available to teachers before discharge under unrelated teacher tenure statutes constitutes due process of law to public employees. I do not agree.

It happens that the respondents are teachers, and teachers do comprise part of the public employees in this state. The majority opinion does not hold that *other* employees can have a *tenure* hearing under the teacher tenure statute, or that even a teacher in a tenure act hearing can explain his refusal to take the oath as a defense to discharge under

either the act in question or the teacher tenure act. I quote from the majority opinion:

> "Instead of being called in by his superior and being asked orally if he belongs to a subversive organization, the legislature has adopted the policy of asking each public employee to state in writing, *i.e.* by affidavit, whether he is at that time a member of such an organization. If he signs the affidavit, that is the end of the matter. If he declines to sign, the employee is subject to immediate discharge. If he has no tenure rights, he has no vested right to public employment, and the act affords him due process. *Nelson* v. *County of Los Angeles*, 362 U. S. 1, 4 L. Ed. (2d) 494, 80 S. Ct. 527. On the other hand, if he has tenure rights, he must be accorded such a hearing as his contract of employment calls for."

Teachers' contract rights do not exclude teachers from the operation of the act in question, the mandate of which is absolute in nature. Explanation of the refusal to take the oath would not, therefore, constitute a defense to discharge in a tenure hearing. I think due process requires an opportunity to defend, not merely to make a prejudged futile statement.

While the avowed purpose of the act is to shield the sovereignty of the states from forcible overthrow, an intended result is that the public payroll shall not be available to persons believing the principles of the Communist party or of the proscribed organizations named by the United States attorney general.

The act does not permit an affiant to put any qualifica-

tions or limitations in his affidavit. As the majority opinio
says: "If he signs *the* affidavit, that is the end of the mat
ter. If he declines to sign, the employee is subject to im
mediate discharge." (Italics mine.)

The scienter mentioned in the original opinion of thi
court does not relate to the accuracy of affiant's know
edge of the organizations or the completeness of his agree
ment with their tenets. It only goes to affiant's menta
competence and his awareness of what acts constitut
joining and being a member of the organizations i
question.

The body of the act constitutes a rule of evidence, viz
that membership in the proscribed organizations const
tutes unrebuttable proof of a state of mind. In this re
spect, it harks back to the theory of the ancient crime o
"Imagining the death of the King," which was committe
by a state of mind without the commission of an ove
act. Thus, a public employee is coerced to reveal his ab
stract secret thoughts under penalty of instant discharg
Scopes was convicted of *teaching* Darwinism. Under th
instant kind of a law, he could be convicted for refusin
to reveal his secret belief in Darwinism.

If by due process of law the Supreme Court of th
United States means the right and opportunity of a mem
ber of the proscribed organizations to defend himself o
the ground that he personally and individually does no
in fact, believe in the forcible overthrow of the goverr
ment, and that he contemplates no overt act to accom
plish such a result, our answer to the remand should b

that the act affords no such hearing and permits no su
defense. I do not agree with the majority opinion's re
resentation to the contrary.

I dissent.

MALLERY, J.

APPENDIX C

JOURNAL

In the Supreme Court of the State of Washington

Friday, March 20, 1959

HOWARD L. NOSTRAND and MAX SAVELLE, *Respondents,* vs. THOMAS BALMER, HAROLD S. SHEFELMAN, DOROTHY BULLITT, ALBERT B. MURPHY, ROBERT J. WILLIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington; CHARLES E. ODEGAARD, President, University of Washington, and JOHN J. O'CONNELL, Attorney General, State of Washington, *Appellants.*	No. 34451

JUDGMENT

Thurston County No. 28814

This cause having been heretofore submitted to the court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the Court having fully considered the same and being fully advised in the premises, it is now, on this 20th day of March, A.D. 1959, on motion of John J. O'Connell, Esquire, of counsel for appellants, considered, adjudged and decreed that the decree of the said Superior Court be, and the same is hereby reversed with directions to dissolve the permanent injunction restraining appellants from performing their official duties under the 1955 act

(except § 3) with respect to respondents and to dismiss their action. Neither party shall be allowed costs in this court.

And it is further ordered, that this cause be remitted to the said Superior Court for further proceedings, in accordance herewith.

Journal 43
Page 194

APPENDIX D

JOURNAL

In the Supreme Court of the State of Washington

Thursday, June 29, 1961

HOWARD L. NOSTRAND and MAX SAVELLE, *Respondents,* vs. HERBERT S. LITTLE, HAROLD S. SHEFELMAN, MRS. J. HERBERT GARDNER, CHARLES M. HARRIS, JOHN L. KING and JOSEPH DRUMHELLER, as the Board of Regents of the University of Washington, CHARLES E. ODEGAARD and JOHN J. O'CONNELL, *Appellants.*	No. 34451

JUDGMENT

Thurston County No. 28814

This cause having been heretofore submitted to the Court, upon the transcript of the record of the Superior Court of Thurston County, and upon the argument of counsel, and the court having fully considered the same, and being fully advised in the premises, it is now, on this 29th day of June, A.D. 1961, on motion of John J. O'Connell and MacDonald, Hoague & Bayless of counsel for appellants and respondents, and upon order of this court, dated June 28, 1961, vacating order dated June 17, 1960, considered, adjudged and decreed, that the decree of the said Superior Court be, and the same is, hereby reversed with directions to dissolve the permanent

injunction restraining appellants from performing their official duties under Chapter 377, Laws of 1955 (except § 3 thereof) with respect to respondents and to dismiss their action. Neither party shall be allowed costs in this court.

Journal 43
Page 573

APPENDIX E

STATUTES INVOLVED

Chapter 254, Laws of 1951 (RCW, Chapter 9.81):

"Section 1. *Definitions.* For the purpose of this chapter:

"(1) 'Organization' means an organization, corporation, company, partnership, association, trust, foundation, fund, club, society, committee, association, political party, or any group of persons, whether or not incorporated, permanently or temporarily associated together for joint action or advancement of views on any subject or subjects.

"(2) 'Subversive organization' means any organization which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or advocate, abet, advise, or teach activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washington, or of any political subdivision of either of them, by revolution, force or violence.

"(3) 'Foreign subversive organization' means any organization directed, dominated or controlled directly or indirectly by a foreign government which engages in or advocates, abets, advises, or teaches, or a purpose of which is to engage in or to advocate, abet, advise, or teach, activities intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of the constitutional form of the government of the United

States, or of the state of Washington, or of any political subdivision of either of them, and to establish in place thereof any form of government the direction and control of which is to be vested in, or exercised by or under, the domination or control of any foreign government, organization, or individual.

"(4) 'Foreign government' means the government of any country or nation other than the government of the United States of America or of one of the states thereof.

"(5) 'Subversive person' means any person who commits, attempts to commit, or aids in the commission, or advocates, abets, advises or teaches by any means any person to commit, attempt to commit, or aid in the commission of any act intended to overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States, or of the state of Washingon, or any political subdivision of either of them, by revolution, force, or violence; or who is a member of a subversive organization or a foreign subversive organization."

Section 2 makes subversive activities a felony.

Section 3 makes it a felony to remain or become a member of a subversive organization or a foreign subversive organization "*knowing* said organization to be a subversive organization or a foreign subversive organization."

Section 4 disqualifies persons who have been con-

victed or found guilty under Sections 2 and 3 of the Act from holding public office.

Section 5 provides for the dissolution of subversive organizations and for disposition of their property.

Sections 6 through 8 and Section 10 were vetoed.

Section 9 makes provision for the attorney general to report to the governor and to the legislature biennially.

Section 11 provides that a subversive person, as defined in the Statute, is ineligible for employment to any office or position in the state, county, municipality or other political subdivision.

Sections 12 and 13 provide that the board or agency of government shall determine by appropriate rules and regulations and other procedures whether any employee is a subversive person.

Section 14 requires employees of the State or any political subdivision thereof to state under oath that he is not a subversive person as defined in the Act and provides that a person refusing to take the oath or who admits that he is a subversive person shall immediately be discharged.

Section 15 provides for discharge of subversive persons from employment if reasonable grounds on all the evidence exist to believe that the person is subversive. It provides that there must be cause for discharge with notice of charge and hearing under appropriate rules and regulations.

Section 16 provides for an affidavit to be filed by a candidate for public office that he is not a subversive person as defined in the law.

Section 17 makes misstatements punishable as perjury and provides for a penalty.

Section 19 states that nothing in the act is to be construed as authorizing civilian or military censorship or the infringement of freedom of speech or other constitutional guarantees.

By Chapter 142, Laws of 1953, Section 1, subsection (5) of the 1951 Act, defining a subversive person, was amended to provide that a subversive person is one who, "with knowledge that the organization is an organization, as described in paragraphs two and three hereof, becomes or remains a member * * *."

By Chapter 377, Laws of 1955, this statute was further amended by adding two new sections and amending Sec. 12 (RCW 9.81.010). By this amendment, the entire tenor of the Act has been changed.

"SECTION 1. Section 12, Chapter 254, Laws of 1951, and RCW 9.81.070 are each amended to read as follows:

"Every person and every board, commission, council, department, court or other agency of the State of Washington or any political subdivision thereof, who or which appoints or employs or supervises in any manner the appointment or employment of public officials or employees shall establish by rules, regulations or otherwise, pro-

cedures designed to ascertain whether any person is a subversive person. In securing any facts necessary to ascertain the information herein required, the applicant shall be required to sign a written statement containing answers to such inquiries as may be material, which statement shall contain notice that it is subject to the penalties of perjury. *Every such person, board, commission, council, department, court, or other agency shall require every employee or applicant for employment to state under oath whether or not he or she is a member of the communist party or other subversive organization, and refusal to answer on any grounds shall be cause for immediate termination of such employee's employment or for refusal to accept his or her application for employment.*" (Amendatory language emphasized.)

"SEC. 2. Section 13, Chapter 254, Laws of 1951, and RCW 9.81.080 are amended to read as follows:

"The inquiries prescribed in preceding sections, other than the written statement to be executed by an applicant for employment *and the requirement set forth in section 1 of this amendatory act, relative to membership in the communist party or other subversive organization,* shall not be required as a prerequisite to the employment of any persons in any case in which the employing authority may determine, and by rule or regulation specify the reasons why, the nature of the work to be performed is such that employment of such persons will not be dangerous to the health of the citizens or the security of the governments of the United States, the state of Washington, or

any political subdivision thereof.

"SEC. 3. *For the purpose of this act, membership in a subversive organization shall be membership in any organization after it has been placed on the list of organizations designated by the attorney general of the United States as being subversive pursuant to executive Order No. 9835.* (Held unconstitutional by court below.)

"SEC. 4. *The communist party is a subversive organization within the purview of RCW 9.81 and membership in the communist party is a subversive activity thereunder.*"

APPENDIX F

THE OATH

The oath demanded of respondents provides as follows:

"UW-1006 7/55

"STATE OF WASHINGTON
"OATH FOR ADMINISTRATIVE RESEARCH, AND
FACULTY PERSONNEL OF THE UNIVERSITY
OF WASHINGTON

.....

Department, office or other agency (Print or type) | Title or Position (Print or type)

STATE OF.....

COUNTY OF.....

ss. AFFIDAVIT

"I, the undersigned, do solemnly swear (or affirm):

"(1) That I will support the constitution and laws of the United States of America and of the State of Washington, and will by precept and example promote respect for the flag and the institutions of the United States of America and the State of Washington, reverence for law and order, and undivided allegiance to the government of the United States;

"(2) That I am not a subversive person or a member of the Communist Party or any subversive organization, foreign or otherwise, which engages in or advocates, abets,

advises, or teaches the overthrow, destruction or alteration of the constitutional form of the government of the United States, or of the State of Washington, or of any political subdivision of either of them, by revolution, force or violence;

"That this statement is voluntarily made by me, pursuant to the provisions of Chapter 377, Laws of 1955, with full knowledge that the same is subject to the penalties of perjury.

.....
(Signature)

"Subscribed to and sworn to (or affirmed) before me this ..... day of ....., 1955, at ....., ...
(City or Place) (State)

Notary Public in and for the State of .....

.....residing at.....

(To be executed in duplicate, one copy to be retained by individual.)"